CAPITAL PUNISHMENT

by

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CHAPTER I

THE NATURE AND HISTORY OF CAPITAL PUNISHMENT

Introduction

The purpose of this research project is to examine the practice of capital punishment. Main emphasis will be placed upon the legal aspects--constitutional and statutory provisions, the courts and their decisions, and movements to change the law. The first chapters will deal with a history of capital punishment while the later chapters will investigate the death penalty in recent times and at the present.

A wide range of data will be employed in the project: historical, sociological, quantitative, legal, and, to a small extent, medical. Historical transitions and facts will be utilized to demonstrate the principles and factors that contribute to the American punitive system. Sociological studies and medical testimony form a basis for evaluating punishment. Quantitative data will be used to illustrate and supplement the findings. Legal research centers around court decisions interpreting constitutional prohibitions and statutory provisions.

Each facet of this investigation is designed to contribute support to the central thesis of this dissertation: that capital punishment violates the constitutional provisions forbidding cruel and unusual punishment. The study will focus on the American scene, although some attempt has been made for comparative purposes in the international area.

After introducing the broad subject matter of a research project, it is customary to define the terms used. Throughout this paper, the

terms "death penalty" and "capital punishment" will have one consistent meaning: the cessation of human life by official command of the state, as prescribed punishment for commission of crime. The essential element is authority. Without being sanctioned by the power of the state, and administered by its duly authorized agents, capital punishment ceases to become punishment for violating the laws and institutions of society, but rather revenge by a private individual or group.

Punishment in general is as old as man himself. History has shown us that in any group of persons, one or more members of the group will violate the accepted values of the majority. The outcome of the violation is punishment. K. S. Carlston states:

> Always present in any group is the problem of the spread between the ideal and the actual, between standards and practice, between what ought to be done and what is in fact done. Group standards and values are not invariably the determinents of individual action. Theft, adultery, failure to pay debts, wounding . . . are forms of deviant behavior which create "trouble" within the group. In such situations the group is faced with keeping order if it is to endure. The function of law in the group is one of applying such mechanisms as will clean up social messes when they have been made.[1]

Some type of social law, enforced by the authority within the community, has always been present in society. In today's world the fact of the institutionalization of law and punishment has become such an accepted part of society, that we no longer think of law as a group function but merely as "social control through the systematic application of the force of politically organized society," to use Pound's oft-quoted definition.[2]

The eternal question within the concept of punishment, and one that is only beginning to be seriously considered is "what purpose does punishment actually serve?" Is it just revenge, for the purposes of

containment alone, or does it actually deter? Albert Camus voices the opinion that punishment is a form of revenge; societies' semi-arithmetical answer to violation of its primordial law.

> The answer is as old as man himself, and usually goes by the name of retaliation. He that hurts me must be hurt; who blinds me must be blinded; who takes a life must die. It is a feeling, and a particularly violent one, which is involved here, not a principle. Retaliation belongs to the order of nature, not to the order of law . . . We have all known the impulse to retaliate, often to our shame, and we know its power: the power of the primeval forests.[3]

This idea of punishment as revenge has not been isolated. Punishment in the form of revenge is not humane, it is brutal. Those that go against the laws of the state have been told by the state: "You have gone against the law, my law, you have injured the people under my protection, and for this I will punish you." Because someone has been hurt, so also must another suffer.

The Ancient Civilizations

Turning to history, a search for the origin of coded law leads to the first appearance of civilization, with all the classical symptoms--cities, agriculture, weapons and armies--which dates around 4500 B.C. History gave birth to two civilizations at the same time; both Semitic: Egypt and Mesopotamia. Civilization in Mesopotamia, now part of modern Iraq, began with city-states. The oldest of the cities in this civilization were Susa, Kish, and Ur. It was around these cities that the first empires were formed.[4]

Sometime around the year 3000 B.C., a king and law-giver named Hammurabi united all the city-states into one vast Babylonian empire. The people of Babylonia received from Hammurabi a set of codified laws, and it is here that the search begins for what man first deemed criminal.[5]

It is highly interesting, and seemingly a paradox, that a civilization existing a full ten centuries before the Jews came out of Ur could have on one hand developed a truly just system of civil law and yet, on the other hand, a butcherous criminal code.[6] The entire Babylonian penal system was built around the idea of retribution. The law was that if any one destroyed another's eye, his own eye should be destroyed. If a bone was broken, his own bone was broken. There were all manners of executions for robbery, false claims, kidnapping, and receiving stolen property (to mention but a few). Here also the custom of trial by ordeal was first recorded. When a man was accused of a crime he was required "to go to the river and plunge in; if he was drowned, the accuser took his house and possessions; if he lived, he was thus proven innocent."[7] It should also be noted that the law of individual retaliation that is so often associated with the Hebrews, actually developed a full ten centuries before Old Testament times.

About the year 2000 B. C. a man named Terah and his son, Abraham, took leave of the city of Ur, crossed over the river Euphrates, and thus became the first Hebrews.[8] It took the Jews approximately 900 years, Egyptian enslavement, a century of wandering and hundreds of small wars, before they attempted a codification of laws. That attempt still stands today in its revised form, deeply embodied in the Western thought. The Torah was a bold leap into the future, a giant stride ahead of anything existing at that time. No existing laws contained anything like the democratic spirit of the Torah. A written legal code was totally unknown to the Egyptians until around 300 B. C., and to the Romans until the second century B. C.[9]

From studying the Bible it would, at first glance, appear that the Torahian code was not lenient toward many offenders of Jewish law. The Jews attached the death penalty to a wide range of offenses: blasphemy, Sabbath breaking, witchcraft, as well as other offenses for which execution might have seemed more permissible, such as murder, kidnapping, and incest.[10]

On the other hand, after an investigation of the Mishnah and the Germara, which were the codes of law compiled after the completion of the Old Testament, it could be argued that it became practically impossible to impose the death penalty in ancient Judea, due to the procedural requirements of Jewish law.[11] For example:[12]

1. Cases involving capital punishment had to be tried before a court of twenty-three qualified members.

2. Trustworthy testimony had to be presented by two qualified witnesses.

3. Circumstantial evidence was not admitted.

4. Men presumed to be "lacking in compassion" were not appointed to the jury and their [the jury's] presumption was always innocent until proven guilty.

5. When a man was judged guilty and was being led to the place of the execution, there was still a provision in his favor. A herald ran before the condemned asking if anyone knew of further testimony favorable to the accused. Should such testimony be forthcoming, there was an immediate delay in the execution.

6. No double jeopardy was allowed.

As the great empires began to rise, there is a detectible trend toward the establishment of two distinct categories of crimes. The first involved crimes against authority, whether it be patriarchal or royal. The second included offenses against individuals. Both types of crimes were considered to be of a serious nature and the distinction seems to have been dictated

by the prevailing religio-cultural philosophy of an empire at a given time.

Keeping this in mind, we turn to the classical example of the Roman Empire, with its high regard for culture and civilization. The Empire declared all crime as a defiance of the emperor's will. Roman citizens and freemen, along with all other persons under the guardianship of Rome, were punished in the name of the emperor. Even though a citizen of another country committed a crime against one of his fellow countrymen, he was, nevertheless, punished for a crime against the person of the emperor. The offender in the days of Rome could expect a hideous end--for example, burial alive was the fate of vestal virgins who violated their vows of chastity.[13] After the promulgation of the Decemiri of the Twelve Tablets,[14] the following were recognized as crimes punishable by death, inter alia: cheating by a patron of his client, perjury, willful murder of a parent and making disturbances in the city at night.[15]

Under Nero, such atrocities as throwing criminals into their open graves and impaling them upon sharpened stakes, were common. The Romans had an exceptionally beastial formula for the punishment of paracides. They were thrown in a sackcontaining a made-dog, a cock, a viper, and an ape.[16]

The Romans made great use of mass public executions to warn the citizenry of treason against the emperor. Claudius, for one of his executions, had 19,000 condemned criminals brought to Rome to be sacrificed in the arenas, while Agrippa put to death 14,000 in the public games.[17]

The second category of crimes, those committed against the individual, were the only concern of the early Chinese. When a man committed an

offense, it was against his neighbor, and many times the neighbor had the sole power to turn the offender over to the public executioner.[18]

The slaughter that characterized the death penalty continued throughout the years. There was only one notable exception: ancient England. It seems strange that a civilization as primitive and barbaric as any the world has known, would devise a complex and lenient punitive system as did the Kents. The early criminal laws of what was to become England, were based entirely on monetary punishment, with only a few exceptions.[19]

The earliest laws to which we have access concerning the Kents, predate the third century and are those of King Ethelberth who received them from an unknown king about a century before him.[20]

The following are examples of the laws existing at that time under the Kentish Kings:[21]

> 1. If a king calls his lieges to him, and anyone molests them there, he shall pay double compensation, and 50 shillings to the king.
>
> 2. If a freeman robs the king, he shall pay back nine-fold that amount.
>
> 3. If any man slays another on the king's premises, he shall pay 50 shillings compensation.
>
> 4. If a man lies with a maiden belonging to the king, he shall pay 50 shillings compensation.
>
> 5. If a man is slain, the lender of the weapon shall pay 20 shillings compensation.
>
> 6. If a homicide departs the country, his relatives shall pay half the wergeld.[22]

These laws were by no means unique within England itself during this time. The laws of the various kingdoms read substantially the same during this era after the defeat of the Picts.[23]

Even some three hundred years later, a look at the laws of the

kingdom of Wessex under King Ine serves to show the relative permanency of this idea:[24]

> 1. If anyone within the kingdom commits an act of robbery or seizes anything with violence, he shall restore the plunder and pay a fine of 60 shillings. (As always, the price increased slightly).
>
> 2. A stranger shall clear himself by his own oath when accused of wrongdoing.
>
> 3. If a man's servant slays a nobleman, whose wergeld is 300 shillings, his owner shall surrender the homicide and pay the value of three men in addition.

The Dark Ages

The Dark Ages added to the butchery that was wrought in the name of justice. No one will ever know the number of scaffolds set up for heretics and apostates, or the number of witches stoned, burned or drowned. The toll taken by the Inquisition in Spain and the Low Countries, or the atrocities of the Russian Czars or the European potentates, can never be assessed. There are records of a German judge who signed 20,000 death sentences in forty-six years.[25]

Not only had the number of capital crimes increased but the mode of executions became, if possible, more sadistic. Torture appeared to be a necessary part of even the simplest form of execution. The death penalty was extended to heretics under the writ de Heretico Comburendo,[26] which was issued from England in 1382. For this purpose the Parliament adopted provisions of the Roman civil law. The law was the subject of abuse and there was a rapid increase of capital punishment in England.[27]

Most barons had a drowning pit as well as a gallows. The owner of Baynard's castle, London, in the reign of King John, had the right to drown traitors in the river of Thames.[28]

Human life, during the Inquisition, was of less value than that of many animals, for the latter could be made to work for something less than a fair share of food. In 1729, for example, more than two hundred Jews were burned to death because they were suspected of being heretics.[29] Heresy was sometimes interpreted broadly. In 1222 a deacon was burned to death at Oxford for embracing Judaism in order to marry a Jewess, and many that lived with Jewesses were condemned for having unnatural affairs.[30]

Miss Jean Plaidy sums up rather well the events that occurred during the Inquisition:

> Thousands were submitted to the cruelest torture these men could devise: the flesh of the victim was torn with red-hot pincers, and molten lead poured into their wounds, many suffered the agonies of the rack and the water torture; some were burned at the stake; every means of dealing pain to the human body was explored; and all this was done in the name of One who commanded his followers to love on another.[31]

It would appear that the countries left untouched by the Inquisition compensated for the fact by enacting hundreds of statutes for which the death penalty could be inflicted. For instance, twelfth-century Russia boasted of nearly one hundred forty (the number was later to rise to an unknown amount under Ivan I); Turkey provided nearly ninety (maiming was their favorite practice, which may account for the low number); the Slavic countries designated some forty; while the Chinese saw thirty crimes for which the death penalty was given.[32]

The Medieval Period

As the Inquisition subsided, and with the coming of the Enlightment, the death penalty neared its extreme conclusion in England--extreme in terms of the way in which England conducted its executions and also in the number of offenses for which the death penalty was administered.

During the sixteenth and seventeenth centuries scaffolds were present in every hamlet over the English countryside. All communities, of any size whatsoever, boasted of a common hill on which people were to be burnt. Every abbey or monastery contained its own private chamber of horrors and the castles throughout the land included some type of room in which criminals were "examined." Pikes and hooks hung from all official buildings where the dismembered parts of the human body were constantly displayed. The bodies of pirates were hung in irons in the public market places and remained there until they disintegrated. Public disections were held twice a day at the medical theater and persons journeyed up the hill to "Old Andrews" in London to watch the hanging, disembowelment, and quartering of criminals.[33]

England probably led the world during the sixteenth and seventeenth centuries in capital laws. In 1622, the infamous Waltham Black Act was passed which added perhaps two hundred and fifty crimes punishable by death to the already existing twenty seven.[34] Such behavior as stealing rabbits and fish, destroying ponds and trees, maiming or exciting oxen or cattle, burning a barn, or going disguished at night were crimes for which many were executed.[35] Sections of the act remained in force well over one hundred years.[36] Even with fairly lax enforcement after 1800, between two and three thousand persons were sentenced to death each year until the number began to taper off after 1815.[37]

In England, conviction for capital offense, whether or not the sentence was executed, usually resulted in an attainer: forfeiture of all lands and property, and a denial of the right of inheritance (corruption of blood). Although appeal of a death sentence itself was nearly impossible, the descendants of an executed person occasionally succeeded in appealing

an attainer.[38]

The usual mode of execution was hanging, though there were several crimes for which this was deemed insufficient. The bodies of pirates were hung in chains from specially built gibbet irons along the streets of England. Executions were always conducted in public and often became the scene of drunken revels.[39] Thackeray's famous description reads in part:

> I must confess . . . that the sight has left on my mind an extraordinary feeling of horror and shame. It seems to me that I have abetted an act of frightful wickedness and violence, performed by a set of men against one of their fellows; and I pray God that it may soon be out of the power of any man in England to witness such a hideous and degrading sight. Forty-thousand persons, say the sheriffs, of all ranks and degrees . . . gathered before Newgate at the very early hour; the most part of them had given up their natural sleep in order to take part in this hideous debauchery, which is more exciting than sleep . . . or any other amusement they may have.[40]

Burning to death was the fate of many a woman convicted of killing her husband. As late as 1786 a crowd of thousands watched Phoebe Harris burn to death at the stake. The worst punishment was reserved for those that would dare to openly defy or treason the king.[41] In 1812, this death sentence was pronounced in England on seven men convicted of high treason:

> That you and each of you, be taken from the place from whence you came, and from thence be drawn on a hurdle to the place of execution, where you shall be hanged by the neck not until you are dead; that you shall be severally taken down, while yet alive; and your bowels shall be taken out and burnt before your faces--that your heads then be cut off; and your bodies be drawn into four quarters, to be at the King's disposal. May God have mercy on your souls.[42]

This bloody code, with its scores of capital offenses and almost daily executions, was considerably mitigated by benefit of clergy and the Royal Preogative.[43] Benefit of clergy arose from the struggle between church and

state in England, and it originally provided that priests, monks, and other clerics were to be remanded from secular to ecclestical jurisdiction for the trial on indictment of felony. In later centuries, this privilege was applied in ordinary criminal courts to more and more persons accused of capital crimes. Eventually, all persons accused of felonies were spared death if the crime was a first felony offense and its was clergyable; provided only that the criminal could recite the "neck verse," or the opening line of Psalm LI, this being construed by the court as a proof of his literate (thus clerical) status. Benefit of clergy became in effect the fictional device whereby first offenders were given lesser punishment.[44]

A far different practice, having a comparable effect, was the trial court's frequent recommendation to the Crown that mercy be granted. Quoting from Radzinowicz:

> Such recommendations for mercy were natural enough, since the judge had no alternative upon conviction of an accused but to sentence him to death; all felonies carried a mandatory death sentence. Because the court's plea for mercy was granted sometimes (mainly those that would make good bondservants in the colonies) at least a small but significant number escaped the English gallows.[45]

Colonial Transition

The migration to America soon contributed changes in the English criminal code, from which emerged new colonial codes that were a unique compromise between the barbaric laws of England and the cold reality of the virgin world. The following laws, all of which were prescribed by the Maryland legislature during the eighteenth century, illustrate the punitive philosophy of the colonial mind:

> A person convicted of stealing, embezzeling, impairing, razzing, or altering any will or record within the province was to forfeit all his goods. Any person that assaults another shall be set in the pillory for two hours and have both his ears nailed thereto. A person convicted of stealing goods valued at less than one thousand pounds of tobacco was to pay fourfold. A person convicted of fornication was to be fined forty shillings or six hundred pounds of tobacco, a person convicted of willfully burning a courthouse was to suffer death by hanging without benefit of clergy.[46]

Capital punishment existed from the very beginning in the New World and on September 30, 1630, John Billington was granted the unique distinction of being the first person to be executed in the American colonies.[47] Billington was a member of the original Pilgrim band and was hanged for killing another colonist in a quarrel.[48] Thus begins the history of the death penalty in America.

The American colonies had no uniform criminal code; each made and enforced its own law, with little regard for either the substance or the machinery of the law in other colonies. Under such an arrangement, it is not difficult to understand why the variations among capital statutes were considerable. A general appreciation of the variations is facilitated by comparing the criminal codes of Massachusetts, Pennsylvania and North Carolina. The earliest statutes providing for capital punishment in America are those of the Massachusetts Bay Colony, dating from 1636. This early codification was titled The Capitall Lawes of New England and lists in order the following crimes: idolatry, witchcraft, blasphemy, murder, assault in sudden anger, sodomy, adultery, statutory rape, rape*, man stealing, perjury in a capital case, and three forms of rebellion--actual, attempted, and conspiracy to accomplish same.[49] Each of these statutes was

*Punishment by death optional

accompanied by Old Testament text to supply legitimacy to its authority. How rigorously these laws were enforced is not known, nor is it known why the rest of the nearly three dozen laws of the Mosaic Code were not adopted by the Bible Commonwealth. In later decades this religious criminal code gave way in all but a few respects to secular needs. Before 1700, arson and treason, as well as a third offense, the theft of goods valued at over forty shillings, were made capital, despite the absence of any biblical justification.[50] By 1785, the Commonwealth of Massachusetts recognized nine capital crimes and they bore only slight resemblance to the thirteen "Capitall Lawes" of the Bay Colony: treason, piracy, murder, sodomy, buggery, rape, robbery, arson and burglary.[51]

Far milder than the Massachusetts laws were those adopted in South Jersey and Pennsylvania by the original Quakers. The Royal Charter for South Jersey granted in 1646 did not prescribe the death penalty for any offense and, while capital crimes eventually appeared, there was no execution in this colony until 1682.[52] In Pennsylvania, William Penn's Great Act of 1682 specifically confined the death penalty to treason. These ambitious efforts to reduce the number of crimes punishable by the deprivation of life were stalemated early in the eighteenth century, when the Crown ordered colonies to adopt far harsher penal codes. By the time of the War for Independence, many of the colonies had roughly comparable criminal codes. Murder, treason, piracy, arson, rape, robbery, burglary, sodomy and, from time to time, counterfeiting, horse-theft and slave rebellion--all were punishable by death. Hanging, without benefit of clergy, was the usual form of execution.[53]

Some states, however, adopted and preserved more rigid codes. As late as 1837, North Carolina declared all of the following crimes punishable

by death: murder, rape, statutory rape, arson, castration, burglary, highway robbery, stealing bank notes, slave-stealing, "the crime against nature,"* dueling, which resulted in death, burning a public building, assault with the intent to kill and concealing a slave with the intent to free him.[54] This harsh code persisted so long in North Carolina partly because the state had no penitentiary and thus had no suitable alternative to the death penalty.[55]

Although lack of a penitentiary was not the exclusive problem of North Carolina, it was not until the time of the American Revolution that any of the colonies considered replacing imprisonment with corporal punishment. When the death penalty was not imposed the offender still had to face substitute punishment, nearly always in the form of corporal punishment.

The most widely employed form of corporal punishment was flogging. It has been extensively used to preserve family, military, and academic discipline.[56] The whipping post may still be seen in Delaware, where it is not yet a historic curiosity. The laws of that state call for a given number of lashes for certain offenses to be administered by the warden in a state prison near Wilmington or in the country workhouse. However, in recent years the whipping post has lapsed into disuse. The last flogging took place in Delaware on June 16, 1952, when the victim received twenty lashes for breaking and entering. Maryland law, too, prescribed the whipping post for "assault on wife," or wife beating, from colonial days until the repeal of the statute in April, 1953.[57]

Branding was a familiar form of punishment in the American colonies and recognized in their criminal procedure. The East Jersey codes of 1668

*Sodomy

and 1675 ordered, for example, that the first offense involving theft was to be punished with a "T" branded on the hand, while the second offense was to be punished by branding "R" on the forehead.[58]

The stocks and pillory were used as a method of administering corporal punishment in early modern times. The stocks held the prisoner, sitting down, with his feet and hands fastened in the locked frame; and the pillory held him, standing with his head and hands similarly locked in the frame. The pillory was not abolished in American until 1837, and the military used it for some years after this.

Confinement in irons was a common and brutal form of punishment. A prisoner might be confined in his cell, both hands and feet fastened by heavy chains to the sides, ceiling, or floor. It was not uncommon for prisoners to be chained in a reclining position upon bars of iron and left in such a position for days or weeks.[59]

The ducking stool was the form of corporal punishment for village scolds and gossips. It was a device in which a victim was strapped to a chair, fastened to a long lever, and then dipped in the water by an operator who manipulated the affair from the banks of the stream or pond while a crowd would jeer at the culprit.[60]

There is, perhaps, a feasible explanation that would explain, at least in part, the colonial punitive practices. It may be all but forgotten by the Americans but the fact still remains that a good many of the early settlers and inhabitants of this country were convicts. The English first instituted the practice of transporting convicts in 1597 and the trend continued until its American termination in 1776. Exactly how many were deported to America is not known, but according to reliable estimates,

the number was nearly one hundred thousand.[61] Many measures were taken by both British and colonial authorities to keep this undesirable element in line. It can be speculated that the colonial laws were, in part, a reaction against this development. The colonist evidently did fear the growing number of criminals, for there are elaborate records which report the systematic sterilization of those deported to the colonies. Margaret Wilson reports that "there is no record of any Virginia offender ever having left an offspring."[62]

CHAPTER I: FOOTNOTES

1. K. Carlston, Law and the Structures of Social Action at 12 (1956).

2. R. Pound, Social Control Through Law at 40 (1942).

3. A. Camus, "Reflections of the Guillotine," in E. London (ed.), The Law as Literature at 261 (1906).

4. For a discussion of this material see S. Hartland, Primitive Law at 42 (1942).

5. For a discussion of the Babylonian and Jewish legal history and their sociological development see M. Dimot, Jews, God and History at 12, 13, 15 and 25-56 (1962).

6. See generally J. Zane, The Story of Law at 24-28 (1927).

7. Id. at 29.

8. M. Dimont, supra note 5, at 28.

9. Id. at 43.

10. J. Joyce, Capital Punishment at 59 (1947).

11. For more information see the 11 Jewish Encyclopedia at 219-220 (1951).

12. I. Kaziss, Judaism and the Death Penalty at 54 (1961).

13. J. Laurence, History of Capital Punishment at 16 (1959).

14. Id. at 4.

15. Id.

16. Id.

17. Id. at 12.

18. For a detailed discussion see T. Mangesi, A Study of the Law of China at 66-68 (1908).

19. All material used in the discussion of the Old English Laws was taken from F. Attenborough, The Laws of the Earliest English Kings at 2, 4, 6-46 (1963).

20. Probably around 50 B. C.

21. For a history of the Kents see St. Bede, Hist. Eccl. II (nd.).

22. Wegeld means "man money," which designated the monetary value which each person of a given social class had placed upon his life.

23. For a discussion of the Picts and their laws see F. Attenborough, supra note 19, at 35.

24. Id. at 34.

25. J. Joyce, supra note 10, at 24.

26. J. Laurence, supra note 13, at 16.

27. Id. at 128.

28. Id. at 130.

29. J. Joyce, supra note 10, at 32.

30. Id. at 34.

31. J. Plaidy, The Rise of the Spanish Inquisition at 199 (1959).

32. G. Vernadsky, Medieval Laws at 40 (1956).

33. L. Radzinowicz, History of the English Criminal Law at 153 (1948). Hereinafter cited as Criminal Law.

34. Id. at 154.

35. Id. at 45.

36. L. Savitz, Dilemmas in Criminology at 67 (1967).

37. Criminal Law, supra note 33 at 45.

38. Id. at 47.

39. L. Savitz, supra note 36, at 68 .

40. W. Thackery, "Going to See A Man Hanged," Frasier's Magazine No. 41 at 62 (August 1840).

41. Criminal Law, supra note 33, at 92.

42. Quoted in G. Scott, A History of Capital Punishment at 27 (1950).

43. Criminal Law, supra note 33, 136.

44. Id. at 137.

45. Id. at 138.

46. Quoted in N. Merness, Maryland as a Proprietary Colony at 277 (1910).

47. E. Carruth, (ed.), Dictionary of American Facts and Dates at 144 (1956).

48. For an interesting account of John Billington see J. Laurence, supra note 13, at 89.

49. J. Haskins, "The Capitall Lawes of New England," 10 Harv. L. Rev. 112 (1956).

50. O. Chitwood, History of Colonial America at 13 (1931).

51. Id. at 42.

52. H. Bedau, (ed.) The Death Penalty in America at 6 (1964).

53. G. Dazell, Benefit of Clergy in America at 16 (1955).

54. F. Caldwell, Red Hannah at 27 (1947).

55. Id. at 28.

56. H. Barnes and N. Teeters, New Horizons in Criminology at 290 (1959).

57. Id. at 291.

58. Id. at 45.

59. Id. at 291.

60. H. Bedau, supra note 52, at 40.

61. H. Barnes and N. Teeters, supra note 56, 290.

62. M. Wilson, The Crime of Punishment at 86 (1936).

CHAPTER II

PENAL REFORM AND CAPITAL PUNISHMENT

Penal reform in America dates from the late eighteenth century and was inspired by the same continental thinkers who started the reform movement in England.[1] In May, 1787, Dr. Benjamin Rush gave a lecture in Benjamin Franklin's house in Philadelphia to a group of friends, recommending the construction of a "House of Reform" so that criminals could be taken off the streets and detained until purged of their anti-social habits.[2] A little over a year later, Rush followed this lecture by an essay entitled "Inquiry into the Justice and Policy of Punishing Murder by Death." He argued its impolicy and injustice. The essay, published several years later, became the first of several memorable papers which originated in this country and urged the abolition of the death penalty.

Rush's analysis was based on an argument borrowed from the great Italian jurist, Cesare Beccaria, whose book on capital punishment had been published a generation earlier and had stirred many European intellectuals. The main points of Rush's argument were simple enough: first, biblical support for the death penalty was spurious; second, the threat of hanging does not serve as a deterrent to crime; third, when a government puts one of its citizens to death, it exceeds the power entrusted to it.

In the years immediately following Rush's essay, several other notable citizens, namely, Benjamin Franklin and the attorney general of Pennsylvania, William Bradford, gave their support to the repeal of that state's capital laws. In 1794, they achieved the abolition of the death penalty for all but murder in the first degree.[3]

These reforms had no immediate effect on the criminal law of other states. Several years later, a distinguished lawyer, Edward Livingston, began a crusade to repeal the death penalty in Louisiana. Commissioned by the Louisiana legislature, he began to draft the model which would attact wide attention and interest.[4] The heart of his proposal, he insisted, was the total abolition of capital punishment. Unfortunately, the legislature was not persuaded and rejected not only his central proposition but most of the rest of his recommendations as well. He did not live long enough to learn that a new and more vigorous crusade to abolish capital punishment would begin during the next half century and would use as its leading piece of propaganda a thirty-one page excerpt from his model code.[5]

It was not until the late 1830's that the writings of Rush and Livingston began to produce results. By this time the legislatures in several states--particularly Maine, Ohio, New York, New Jersey, and Pennsylvania--were overwhelmed with demands to abolish the death penalty. Many legislatures convened in extra sessions to hear committee reports and recommendations. Anti-gallow societies came into being in every state on the eastern seaboard, and in 1845, the American Society for the Abolition of Capital Punishment was organized.[6]

The high-water mark was reached in the 1840's when Horace Greely, the editor of The New York Tribune, became one of the nation's leading critics of capital punishment. In New York and Massachusetts, abolition bills were constantly before the legislatures.[7] Then in 1847, the Territory of Michigan voted to abolish hanging and substitute life imprisonment. This law took effect on March 1, 1847, and Michigan became the first jurisdiction in the English-speaking world to abolish capital

punishment.[8]

However, this early move was followed by a disorderly rush to reinstate capital punishment in the first part of the twentieth century. Had it not been for the persuasive voices of Clarence Darrow and Lewis E. Lawes, the renowned warden of Sing Sing prison, the lawless days of the 1920's might have resulted in the death penalty being universally reinstated throughout America.[9] Table I charts the checkered career of the death penalty in the United States and indicates a recent trend toward abolition.

TABLE I

CAPITAL PUNISHMENT IN THE UNITED STATES[10]

States	Abolition	Restoration	Reabolition
Michigan	1846		
Rhode Island	1852		
Wisconsin	1853		1966
Iowa	1872	1878	1965
Maine	1876	1883	
Colorado	1897	1901	
Kansas	1907	1935	
Washington	1911	1920	
Oregon	1913	1929	1966
North Dakota	1915	1939	1965
South Dakota	1915	1917	
Tennessee	1915	1917	
Arizona	1915	1918	
Missouri	1916	1930	
Puerto Rico	1917		
Alaska	1929		
Hawaii	1957		
Delaware	1957	1961	1964
West Virginia	1958		

Many observers have noticed that in recent years certain capital crimes have been quietly removed from the state statute books. Nevada dropped train-wrecking from its list of capital crimes in 1950, and Illinois repealed the death penalty for dynamiting in 1951.[11] On the

whole, however, many more capital laws have been added during this century than have been removed, and considerable publicity has surrounded these additions.

Today, depending on how they are classified and counted, between 33 and 37 crimes in the United States carry the death penalty.[12] They vary from the crimes that have almost always brought death to offenders in almost every civilized community, such as, murder, kidnapping, rape and treason, to the unique examples of desecrating a grave in Georgia and setting a fire to a prison in Arkansas. It is important to note that almost all of the nearly three thousand executions in the United States since 1930, took place after conviction for one of the four traditional crimes mentioned above.[13]

The following table classifies capital crimes according to states:

TABLE II

CAPITAL CRIMES IN THE FIFTY ONE JURISDICTIONS[14]

Alaska - None

Arizona - Murder, kidnapping for ransom where the victim is not released unharmed, treason, perjury in a capital case resulting in the death of an innocent person,* armed assault by a life-term prisoner,* train robbery, rape.

Arkansas - Murder, kidnapping for ransom where the victim is not released unharmed,* kidnapping to maim, rob or torture, or to prevent arrest of detection after commission of a felony, carnal knowledge of a woman drugged for that purpose, forcing a woman to marry, arson in a prison by a convict.*

California - Murder, kidnapping for ransom, treason,* perjury in a capital case which results in the death of an innocent person,* armed assault by a life-term prisoner,* train-wrecking if death results.*

* Indicates that the death penalty is mandatory.

Colorado - Murder, kidnapping where the victim suffers bodily harm or the threat thereof, perjury in a capital case resulting in the death of an innocent person,* armed assault by a life-term prisoner.

Connecticut - Murder, treason,* attempt on the life of the President or the Ambassador of a foreign country,* causing death by arson, causing death by train-wrecking.

Delaware - None

District of Columbia - Murder, rape, carnal knowledge,* kidnapping for ransom, bombing, machine-gunning.

Florida - Murder, rape, carnal knowledge,* kidnapping for ransom, crimes against nature.

Georgia - Murder, kidnapping for ransom, rape, carnal knowledge, treason, armed robbery, dynamiting, arson, castration, descration of a grave, insurrection, perjury in a capital case resulting in an execution, abortion which causes death in a woman, causing death by mishandling of a poisonous reptile.

Hawaii - None

Idaho - Murder, kidnapping for ransom, treason, lynching.

Iowa - None

Indiana - Murder, kidnapping for ransom, treason.

Kansas - Murder, kidnapping for ransom or with bodily harm to the victim, treason,* perjury in a capital case resulting in the execution of an innocent person.

Kentucky - Murder, kidnapping for ransom, rape, armed burglary, assault to rob, lynching, bombing.

Louisiana - Murder, kidnapping with bodily harm to the victim, rape, carnal knowledge, treason.

Maine - None

Maryland - Murder, kidnapping, rape, assault to commit rape, carnal knowledge.

Massachusetts - Murder, murder in the commission of rape.*

Michigan - None

Minnesota - None

* Indicates that the death penalty is mandatory.

Mississippi - Murder, kidnapping, rape, armed robbery, bombing, carnal knowledge, attempted carnal knowledge, treason.*

Missouri - Murder, kidnapping for ransom, rape, carnal knowledge, treason, robbery, train robbery, bombing, perjury in a capital case resulting in the execution of an innocent person.

Montana - Murder, kidnapping for ransom, treason,* perjury in a capital case resulting in the execution of an innocent person.*

Nebraska - Murder, kidnapping with bodily harm to the victim.

Nevada - Murder, kidnapping with bodily harm to the victim, rape, carnal knowledge, aggravated assault to commit rape, treason, dynamiting.

New Hampshire - Murder

New Jersey - Murder, kidnapping for ransom, treason, assault on a chief of state or his successor.

New Mexico - Murder, kidnapping for ransom with bodily harm to the victim, killing a jailer while forcing entry into a jail, assault on a train to commit a felony,* freeing a capital offender by force, train-wrecking.

New York - Murder, kidnapping where the victim is not released before the trial, treason.*

North Carolina - Murder, rape, carnal knowledge, burglary, arson, causing a death in a duel, causing death by train-wrecking.*

North Dakota - None

Ohio - Murder, kidnapping for ransom, killing a federal or state chief of state.*

Oklahoma - Murder, kidnapping for ransom, rape, carnal knowledge of a victim who is previously chaste, armed robbery.

Oregon - None

Pennsylvania - Murder, assault with the intent to kill by a life-term prisoner.

Puerto Rico - None

Rhode Island - Murder by a life-term prisoner.*

* Indicates that the death penalty is mandatory.

South Carolina - Murder, kidnapping where the victim is not released alive before the trial, rape, carnal knowledge, lynching, gathering or delivering information or giving aid to the enemy in wartime, causing death in a duel, third conviction for crime(s) optionally punishable by death. Others too numerous to mention.

South Dakota - Murder, kidnapping where the victim is bodily harmed.

Tennessee - Murder, kidnapping for ransom, rape, carnal knowledge, armed robbery, assault while disguised.

Texas - Murder, kidnapping for ransom, rape, carnal knowledge, treason, perjury in a capital case resulting in an execution,* lynching, armed robbery, bombing, instigation of a minor by a relative or spouse to commit a capital crime.

Utah - Murder, kidnapping for ransom, armed assault by a life-term prisoner.*

Vermont - Murder, kidnapping for ransom, treason,* destruction of vital property by a group in wartime.*

Virginia - Murder, kidnapping for ransom where the victim is not released unharmed, treason,* rape, kidnapping of a female to coerce her into prostitution or concubinage, carnal knowledge, attempted burglary, attempted rape, attempted robbery, arson, using a machine gun while committing any crime.

Washington - Murder, kidnapping for ransom, treason.*

West Virginia - None

Wisconsin - None

Wyoming - Murder, kidnapping for ransom where the victim is not released unharmed, train robbery, train-wrecking.

United States (Federal crimes) - Murder, kidnapping for ransom where the victim is not released unharmed, rape, treason, taking a hostage or causing a death during a bank robbery, aid or information to an enemy during wartime, aircraft piracy, supplying heroin to a minor, espionage violations of the Atomic Energy Act.

* Indicates that the death penalty is mandatory

Recent Developments

Besides in the states which have already banished capital punishment and those where it is no longer used, there are at present many attempts underway in the state legislatures to abolish the death penalty.

West Virginia underwent a trial period after banishing the death penalty in 1965. That period will presently expire on the first day of August, 1968. Spokesmen for that state have noted that the "capital offense" rate has declined slightly each year since the repeal of West Virginia's capital punishment statute.[15]

Indiana passed a bill abolishing capital punishment, but it was vetoed by Governor George Branigan. The veto came four days after a state trooper was shot to death, bringing a flood of letters urging the veto. The Governor said: "In my heart I am opposed to the taking of the life of another, but I cannot sign away this awful penalty unless it is the clear mandate of the people."[16]

The legislature of Tennessee failed by one vote in their House of Representatives to pass a bill abolishing capital punishment. Governor F. Clement, who had supported the bill, immediately commuted the death sentence of five convicts who were awaiting their execution.[17] This was the fifth attempt of Tennessee within the last fifteen years to abolish the death penalty and now a new bill is in preparation to impose a trial period for five years without the death penalty.[18]

On December 10, 1967, the Maryland legislature passed a bill which abolished the death penalty for all crimes except the willful murder of a policeman, treason, or the killing of a prison guard. The motivations for the new law can easily be discovered since only four executions have taken place within Maryland in the last ten years; all were for the killing

of policemen.[19]

In New York twenty-one men are awaiting execution while a commission is considering a recommendation to abolish capital punishment. The Commission is headed by District Attorney Frank D. O'Connor of Queens, who considers capital punishment "barbarism" and an act that has not proven effective to the objective of deterrence.[20]

Legal Action Groups

The American Civil Liberties Union has been most active in recent years in the field of capital punishment. Although its attacks on capital punishment as such has been unsuccessful, reason for new hope has been provided by the recent decisions liberalizing jury provisions in capital cases, and most of the requests for stays of execution within the individual states have been handled by ACLU attorneys. At present, ACLU defense counsel is in charge of a case challenging the constitutionality of capital punishment itself.[21] The A.C.L.U. has also undertaken a comprehensive survey of southern states and their administration of the death penalty for rape. The Legal Defense Fund of the A.C.L.U. has covered, thus far, six of the seventeen Southern states in which rape is a capital crime. A spokesman for the group recently stated:

> In the Southern states, a white woman is more likely to be raped by a white man than by a Negro, but Negroes are executed for the rape of white woman exactly nine times more frequently than whites. Furthermore, the rapist of a Negro woman, whether he is white or Negro, is never executed.[22]

The National Association for the Advancement of Colored People is another powerful legal action group and brings great influence to bear in any courtroom of the United States. They have also been active in the

area of capital punishment and more specifically in the area of Negroes and the selection of juries. They are currently attacking the death penalty in Nevada under the contention that most juries are composed of whites and are out of proportion to the Negro population. They have also brought forth statistics to show that although the white criminal population accounts for more than sixty per cent of the capital crimes in the United States, nearly twice as many Negroes are executed in any given time span.[23] The N.A.A.C.P. often joins forces with the A.C.L.U., and they are now working very closely on the question of capital punishment. It is within the realm of prediction that this term of the Court may see the death penalty become either entirely atrophied or declared unconstitutional because of the effort of these two groups.

The task that lies before any legal group dealing with the question of capital punishment is to assemble the vast amount of facts, statistics and histories so that a valid test or standard may be applied to the death penalty in our maturing society.

CHAPTER II: FOOTNOTES

1. A. Earle, Curious Punishments of Bygone Days at 86 (1896).

2. R. Radzinowicz, Capital Punishment in England at 500 (1961).

3. A. Filler, Movements to Abolish the Death Penalty at 52 (1954).

4. F. Barnes (ed.), The Complete Works of Edward Livingston at 224-268 (1873).

5. For the excerpt see Id. at 224-238.

6. H. Bedau (ed.), The Death Penalty in America at 12 (1964).

7. J. Post, "Early Efforts to Abolish Capital Punishment," 11 Penn. L. Rev. at 49 (1949).

8. H. Bedau, supra note 6, at 10.

9. Id. at 14.

10. All information used in this table was taken from Bedau, Id. at 10.

11. Id. at 13.

12. J. Joyce, Capital Punishment at 261 (1959).

13. J. Joyce quotes this figure, supra note 12, at 140.

14. All information in Table II was taken from Bedau, supra note 6, at 23-24. The author has eliminated some of the older capital statutes that are antiquated and have fallen into complete disuse.

15. U.S. News and World Report, April 5, 1968, at 6.

16. K. C. Star, January 8, 1968, at 1, col. 5.

17. G. Fruend, "A Bill to Abolish Capital Punishment," Tenn L. Rev. at 657 (Feb. 10, 1968).

18. Id. at 661.

19. R. DeVolt, "Does Maryland Abolish Capital Punishment?" Mo. L. Rev. at 44 (Mar. 15, 1968).

20. N.Y. Tribune, Dec. 29, 1968, at 2, col. 2.

21. Playboy, "Florum" at 34 (May, 1968).

22. Id. at 47 (Jan. 1968).

23. Id. at 48.

CHAPTER III

CONSTITUTIONAL BASIS

As the preceding chapters have demonstrated, the death penalty in modern America is a legacy of history, supported by precedent which reaches back to the first records left by civilization. It is not only a historical question but also a legal dispute having definite overtones in our society today. One of the best approaches to this legal question is to examine the controlling constitutional provisions, which necessarily requires an inquiry into the potential limitations upon punishment in general, and capital punishment in particular. Since the discussion focuses largely on the federal questions presented, it will be confined to an analysis of pertinent parts of the United States Constitution; mention of state law is included only when it contributes to the primary discussion.

Three provisions of the Constitution are applicable here: the eighth amendment; the due process clause of the fourteenth amendment; and, by virtue of the most recent United States Supreme Court decisions, the sixth amendment guarantee of trial by jury.

Amendment VIII

The first general limitation on the methods of punishment was added to the United States Constitution by the framers of the Bill of Rights, adopted immediately after the Constitution took effect. The eighth amendment reads:

> Excessive bail shall not be required, nor excessive fines be imposed, nor cruel or unusual punishments be inflicted.[1]

This prohibition against cruel and unusual punishment is a universal rule of constitutional law in the United States.[2] Every state constitution but those of Connecticut and Vermont has a comparable clause, and Vermont's highest court has ruled that the prohibition is a part of the common law of the state.[3] The concept has deep roots in English experience. The Magna Carta provided that "a freeman shall be amerced for a small offense only according to the degree of the offense; and for a grave offense he shall be amerced according to the gravity of the offense."[4]

The classic statement of the principle, from which American phraseology is derived, was the English Bill of Rights of 1689, a part of which declared: "excessive bail ought not to be required, nor excessive fines imposed; nor cruel or unusual punishments inflicted."[5] But this sentiment was articulated much earlier in colonial documents. The Massachusetts Body of Liberties of 1641 declared that: "for bodilie punishments we allow amongst us none that are inhumane Barbarous or cruell."[6] The bills of rights of the earliest constitutions of the five original states had provisions forbidding excessive bail, or cruel and unusual punishment.[7] Article 2 of the Northwest Ordinance of 1787 provided: "All fines shall be moderate; and no cruel or unusual punishment shall be inflicted."[8] The universality of this principle is reflected in the Universal Declaration of Human Rights which the General Assembly of the United Nations adopted on December 10, 1948: "No one shall be subjected to torture or to cruel inhuman or degrading treatment or punishment."[9]

Story, in his Commentaries, has expressed the view that the provision against cruel and unusual punishment is unnecessary in a free government

and was adopted only as an admonition to all departments to warn against such practices and violent proceedings that had taken place in England.[10] The Supreme Court has challenged Story on the ground that the authority he cites does not indicate such a limited interpretation. The Court has often asserted that the framers of our Bill of Rights had something else in mind than to merely add verbiage to the Constitution.[11]

The framers were undoubtedly influenced by the views of Blackstone and Montesquieu.[12] Writing in 1884, Montesquieu said:

> When I first attended executions, I was shocked to the greatest degree. I was in a manner convulsed with pity and terror, and for several nights after, I was in a very dismal situation.[13]

Blackstone manages to give the reader a gory account of the practices in England during the eighteenth century when he writes:

> Of these punishments some are capital, which extend to the life of the offender, and consist generally in being hanged by the neck until dead, though in very atrocious crimes other circumstances of terror, pain, or disgrace are super-added; as, in treasons of all kinds, being drawn or dragged to the place of execution; in high treason affecting the king's person or government, embowelling alive, beheading, and quartering.[14]

It can be reasonably argued that the views of Montesquieu and Blackstone regarding severity of punishment impressed the framers, and that it was their intention to eliminate the practices summarized and condemned by these two eminent legal scholars.[15]

During congressional consideration of the proposed Bill of Rights, cruel and unusual punishment received little debate. According to the Annals of Congress, there were two primary objections to the adoption of the eighth amendment. Mr. Smith felt the phrase "cruel and unusual" was too indefinite. Mr. Livermore contended: "It is sometimes necessary to hang a man, villains often determine whipping and, perhaps, having their

ears cut off; are we in the future to be prevented from inflicting these penalties because they are cruel?"[16]

Amendment XIV

Another potentially substantial limitation on cruel and unusual punishment is found in the due process clause of the fourteenth amendment, which forbids states to deny any person life, liberty or property without due process of law.[17] It derived from a similar provision, the "law of the land," which had guarded the concept in English tradition for centuries before the fourteenth amendment was adopted. The Magna Carta contained the pledge that "no freeman shall be taken or imprisoned or disseized or exiled or in any was destroyed . . . except by the lawful judgment of his peers and by the law of the land."[18] The Magna Carta from time to time was reaffirmed by successive English monarchs, and in the Statute of Westminster the phrase "due process" occurred for the first time in English law.[19]

The phrase, "law of the land," was incorporated into several colonial charters and thus became part of the commonly accepted body of liberties of the American colonists. In 1791, a "due process" clause almost identical to that much later included in the fourteenth amendment, found its way into the Federal Constitution as part of the fifth amendment.[20] A Supreme Court decision in 1833 held that the Bill of Rights did not apply to the states and thus the protective quality of both the eighth and the fifth amendments were significantly restricted.[21] It followed that an additional amendment would have to be added if individuals were to be protected from their own state governments. This protection came in the form of the due process clause of the fourteenth amendment.

Due process of law itself is of two types: substantive and procedural. The distinction between the two is not always clear, but there is a basic and vital difference. Substantive due process restricts the contents of the legislation or ordinance, while procedural due process regulates the manner in which the fruits of the legislation or ordinance are carried out by public officials.[22] In both substantive and procedural terms, the test of whether due process has been denied is whether a governmental action has been "capricious, arbitrary, or unreasonable."

There has been a general disagreement among the members of the Supreme Court as to whether the specific guarantees of the Bill of Rights were included in the due process clause of the fourteenth amendment. The Court has consistently refused to lay down any comprehensive definition or formula for due process, dealing with the problem by a method of "inclusion and exclusion." To put the question more aptly: "How far, if at all, does the language of the first section of the fourteenth amendment apply to the states the twenty-five specific rights listed in the Bill of Rights as a prohibition upon state action?"[23]

The Court, through the years, has considered several approaches to the meaning of the fourteenth amendment. Most involved relating the Bill of Rights to this one of the Civil War Amendments. The first approach, introduced by Justice Cardozo, holds to the concept of "Honor Roll." Under the Honor Roll theory, only those rights that are deemed to be fundamental and necessary to a scheme of ordered liberty are protected by the fourteenth amendment.[24] The second, a touchstone of the first Justice Harlan, and associated with Justices Black and Douglas, is the "total incorporation" theory, which holds that the Bill of Rights was incorporated into the due process clause--lock, stock and barrel--with the adoption of the fourteenth

article of amendment. The third major position is the "fair trial" or the "case-by-case" approach. Under this method, the Court would simply examine each case on its own merits, testing each for fairness.

In inquiring into cruel and unusual punishment, this paper will be concerned primarily with procedural due process, although, the importance of the substantive aspects will become manifest. The concept and the fourteenth amendment guarantee requires a general standard of fair procedure; in other words, procedural due process denies to agents of government the power to flinch away private rights by dubious methods.[25] In the words of Justice Frankfurter, a violation of due process constitutes "conduct that shocks the conscience . . . . bound to offend even hardened sensibilities . . . . States in their prosecutions respect certain decencies of civilized conduct."[26]

By a process of "selective incorporation," most of the Bill of Rights has been included in the fourteenth amendment, while total incorporation has never commanded a majority of the Court. For our purposes, the Court has interpreted fourteenth amendment due process as making the prohibition against cruel and unusual punishments a federal constitutional limitation on states as well as the national government.[27]

The phrase "cruel and unusual" is profoundly ambiguous. It depends upon certain dynamics of society and the state of men's minds. Although realities have been changing during the many centuries since the phrase was coined, judicial interpretation of the phrase in terms of contemporary society has only recently begun and it is far from complete.

One of the issues on which the Court has not directly ruled is the challenge to death as a penalty, on grounds that it constitutes cruel and unusual punishment contrary to the eighth and fourteenth amendments. The

thesis that is now a substantial question rests in part on judicial decisions which have defined and explored the notion of cruelty in the eighth amendment and the notion of due process in the fourteenth.

Amendment VI

The final potential limitation on capital punishment rests in the sixth amendment guarantee of trial by an impartial jury, made applicable to the states by the fourteenth amendment. One recent decision has dealt with the sixth amendment right to an "impartial" jury and the practice of the automatic exclusion of jurors opposed to capital punishment.[28] Another question is presented by statutes which provide that the death penalty shall be inflicted only upon the recommendation of a jury, which has the effect of discouraging an accused's assertion of his right to trial by jury.[29]

The facts of the specific cases and the decisions of the courts are presented in the following chapter. As it will be seen, the Supreme Court has declined to hold the death penalty, per se, unconstitutional. However, a careful review of the decisions and a close analysis of the language of the opinions, supports the view that the constitutionality of capital punishment is very much in question today.

CHAPTER III: FOOTNOTES

1. U. S. Const., amend. VIII.

2. F. Jartas, "The Constitutional Prohibition Against Cruel and Unusual Punishment: Its Present Significance," 18 Vand. L. Rev. at 680 (April, 1951).

3. State v. Frank O'Brien, 106 Vt. 97; 170 A.198 (1934).

4. D. Fellman, "Cruel and Unusual Punishment," 19 Jol. Pol. at 241 (July, 1957).

5. Id. at 242.

6. Id. at 241.

7. Id. at 233.

8. Id.

9. U.N. Survey, 'Capital Punishment," 16ECOSOC at 7 (1962).

10. Story, 2 Comm. at 441 (1896).

11. Weems v. United States, 217 U.S. at 349 (1910).

12. This view is presented by Bryce, 1 Amer. Const. at 375 (1889).

13. Montesquieu, "Executions," Paris Magazine Vol. XVIII at 34 (1774). Obtained by photostat of the original copy from New York Film Series, "Voltaire and Montesquieu," set 4 at frame 111 (1965).

14. Blackstone, 2 Comm. at 441 (1750).

15. G. Gottlieb, "Testing the Death Penalty," S. Calif. L. Rev. (July, 1961).

16. 38 Annals of Cong. at 225 (1787).

17. "Nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV.

18. The section of the Magna Carta quoted is Article 20. It can be found in reprinted form in Blackstone's Great Charter at 25 (1784). An account of the original version of this Article can be found in W. McKechnie, Magna Carta at 44 (1914).

19. R. Pound, Development of the Constitutional Guarantees of Liberty at 19 (1957).

20. "Nor be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

21. Barron v. Baltimore, 33 U.S. (7 Pet.) 243 (1833).

22. H. Abraham, The Judiciary at 45 (1965).

23. For a discussion of this concept see Id.

24. See Palko v. Connecticut, 302 U.S. at 325 (1937).

25. H. Abraham, supra note 22, at 45.

26. See Rochin v. California, 342 U.S. at 168 (1952).

27. Robinson v. California, 370 U.S. 660 (1962).

28. Witherspoon v. Illinois, cert. granted 20 L. Ed. 2d (Doc. 1015, 1968).

29. Jackson v. United States, 390 U.S. 570 (1968).

CHAPTER IV

THE COURT, THE CONSTITUTION, AND THE DEATH PENALTY

The Wilkerson Case

The first real test of cruel and unusual punishment came before the United States Supreme Court in Wilkerson v. Utah.[1] In 1862, the Territory of Utah provided that whenever a person was convicted of a capital offense, he should "suffer death by being shot, hanged, or beheaded, as the court should direct."[2] This law was repealed by the passage of the revised penal code of 1879, which provided only that "every person guilty of murder was to suffer death," leaving the mode of execution to the judgment of the court.[3]

Wilkerson was tried and convicted of murder in the first degree in the Utah court of original jurisdiction. He was sentenced to be taken from his cell on December 14, 1878, and shot to death. Wilkerson sued out a writ of error to the supreme court of the Territory of Utah alleging two contentions: first, since Utah prescribed no definite mode of execution, the court of original jurisdiction had erred in sentencing him to a specific mode, i.e., shooting; second, he contended that execution by shooting was a cruel and unusual punishment and was contrary to the command of the eighth amendment.[4] The Territorial Supreme Court upheld the trial court and Wilkerson prosecuted a writ of error to the United States Supreme Court.

Mr. Justice Clifford, speaking for the Court, was brief and definite in rejecting the petitioner's first claim:

> Territories are invested with legislative power which extends to all rightful subjects of legislation not inconsistent with the Constitution and the laws of the United States. By virtue of that power, the legislative branch of the Territory may define offenses and prescribe the punishment of the offenders, subject to the prohibition of the Constitution that cruel and unusual punishment shall not be inflicted. Therefore, the several sanctions of the Code which declare certain crimes to be punishable as therein mentioned, devolve a duty upon the court authorized to pass sentence to determine and impose the punishment prescribed by the judgment of the court.[5]

Having established the power of the Territory to provide for capital punishment by leaving the mode of execution to the discretion of the judge in each case, Clifford turned to the other point of alleged error: that death by shooting violated the prohibition of the eighth amendment. He agreed that this provision operates as a negative restraint on governmental power to the extent that it forbids the imposition of certain kinds of punishment, but whether it served as such a limitation in the case at hand depended upon the meaning of "cruel and unusual:"

> Difficulty would attend the effort to define with exactness the extent of the constitutional provision forbidding cruel and unusual punishment . . . but it is safe to affirm that punishments of torture and all others involving unnecessary cruelty are forbidden by that amendment [eighth] to the Constitution.[6]

Using "torture" as his measurement, he proceeded to examine the views of a number of authorities, and then stated the Court's conclusion on the validity of execution by shooting under the eighth amendment.

> Capital punishment may either be by shooting or hanging. For mutiny, for treason and piracy, it is generally by shooting; for desertion in the face of the enemy it is also common to shoot the offender. This is the procedure used by the military and by all authority it would seem to be correct. There is no inherent cruelty in this method as opposed to the practices mentioned by Blackstone.[7]

The concept of "torture," relied upon by the Court, was found in the writings of Blackstone, who designated disemboweling alive, beheading and

public dissection as forms of punishment involving inherent cruelty.[8]

Since shooting did not constitute inherent cruelty, it was not "cruel or unusual" either; likewise, since the court of original jurisdiction was clearly authorized to exercise complete discretion in prescribing the method of execution, it had not erred. Thus, both of Wilkerson's assignments of error were rejected.

It is clear that Wilkerson saddled the eighth amendment with a restrictive interpretation, condemning only "torture," and "unnecessary" cruelty. This was an unsatisfactory yardstick for those hoping to convince the Court that the eighth amendment proscribed all forms of capital punishment--it was unlikely that the Court would approve the least common mode of execution and then find the other more widely-accepted methods objectionable.

Ex Parte Kemmler

The reformers were provided with an opportunity to find out whether the judicial attitude toward the death penalty had changed, thirteen years later, when one William Kemmler was sentenced to be electrocuted in New York's newly-installed electric chair.[9]

Kemmler, after his conviction, applied to the New York Court of Appeals for a writ of error, which was dismissed. Kemmler then petitioned the United States Supreme Court to review the denial of that writ.[10]

The main points raised by the petitioner were: first, to execute by sending a charge of AC electricity through the body is cruel and unusual punishment; second, the fourteenth amendment due process clause forbids the states to impose cruel and unusual punishment.

Mr. Justice Fuller rejected the contention that the fourteenth amendment

made the Bill of Rights amendments applicable to the states:

> The Fourteenth Amendment does not radically change the whole theory of the relations of the State and the Federal Government to each other, and of both governments to the people. The same person may at the same time be a citizen of the United States and a citizen of a State. Protection of life, liberty, and property rests, primarily with the States, and the Amendment furnishes an additional guaranty against any encroachment by the States upon those fundamental rights which belong to citizenship, and which the State governments were created to secure. Undoubtedly the Amendment forbids any arbitrary deprivation of life, liberty, or property, and secures equal protection to all under like circumstances in the enjoyment of their rights; and, in the administration of criminal justice, requires that no higher punishment shall be imposed upon all for like offenses. But it is not designed to interfere with the power of the State to protect the lives, liberties, and property of its citizens, and to promote their health, peace, morals, education and good order.[11]

Having disposed of the total incorporation issue, he then clearly opened the way for an attack on punishment which was cruel and unusual on general due process grounds, independent of the eighth amendment provision. The Court stated that "any punishments which involved torture or a lingering death" would be considered contrary to the concept of due process, per se, and thus unconstitutional.[12]

Justice Fuller proceeded, as did Justice Clifford in Wilkerson, to apply the test of torture to execution by electrocution.

> We have examined the testimony and can find but little in it to warrant the belief that this new mode of execution is cruel, within the meaning of the Constitution, though it is certainly unusual. On the contrary, we agree with the court below that it removes every reasonable doubt that application of electricity to the vital parts of the human body must result in instantaneous, and consequently painless, death.[13]

The Court concluded that:

> Since the enactment of this Statute was in itself within the legitimate sphere of the legislative power of the State, and in the observance of those general rules prescribed by our systems of jurisprudence; and the Legislature

> of the State of New York determined that it did not inflict cruel punishment, and the courts have sustained that determination. We cannot perceive that the State has thereby abridged the protection of the petitioner which the fourteenth amendment due process clause affords him.[14]

The Wilkerson and the Kemmler decisions made two facts clear: first, government was free to legislate within the realm of criminal law, subject to the provisions mentioned, and second, whether the imposition of punishment violated either the eighth or the fourteenth amendment would be the test of torture.

Another important contribution made by Justice Fuller was the first substantive pronouncement on the constitutionality of the death penalty as an institution when he said: "but the punishment of death is not cruel within the meaning of the Constitution."[15] The common forms of execution employed within the United States had already been judged not to be torture, and Justice Fuller shut the door on any attempt to invalidate the practice of taking life, regardless of the method used, as punishment for crime--this closed the question, pending the formulation of new judicial criteria for measuring punishment against constitutional guarantees.

O'Neil v. Vermont

The basis for a different standard was laid in O'Neil v. Vermont.[16] O'Neil was a maker and transporter of "bootleg" whiskey. He was apprehended in Vermont while coming from New York and charged with the possession of 457 bottles of intoxicating beverages under a Vermont law which provided that "no person shall manufacture, sell, or give away, spirituous or intoxicating liquor unless he is duly authorized."[17] The law also provided that the accused could be charged as if each item so manufactured or dis-

tributed was a separate offense for which he could be both fined and imprisoned and forced to pay the costs of prosecution.[18] The trial court convicted O'Neil on 307 counts, fined him a total of $10,000.00 and ordered him to be imprisoned for 19,919 days. The supreme court of Vermont upheld the trial court, and O'Neil asked the United States Supreme Court for review on writ of error.

O'Neil did not invoke the protection of the fourteenth amendment due process clause, but rather, presented his argument under the commerce clause of the United States Constitution. He contended that the power to regulate goods moving from state to state was specifically delegated to Congress, and that Vermont, by imposing a fine upon his whiskey moving in interstate commerce, had interferred with the power of Congress.

The Court, in the opinion delivered by Justice Blatchford, repudiated O'Neil's contention and dismissed the writ of error on the ground that the case "does not involve any Federal question."[19]

Although cruel and unusual punishment was not assigned by plaintiff in error, the Court did say:

> If the penalty were unreasonably severe for a single offense, the constitutional question might be urged, but here the unreasonableness is only in the number of offenses the respondent has committed. We forbear the consideration of this question, because, as a Federal question, it was not assigned in error; and, so far as it is a question arising under the Constitution of Vermont, it is not within our province. Moreover, it has always been ruled that the Eighth Amendment does not apply to the states.[20]

Since the question of the severity of O'Neil's punishment was given little discussion in the majority opinion, Justices Field and Harlan dissented. The question of interstate commerce was not relevant in their opinion. They thought that since O'Neil had raised the question of cruel punishment in the court below, it should have been considered by the Court.

Mr. Justice Field expressed shock at the sentence O'Neil had received and said:

> Had he been found guilty of highway robbery, he would have received less punishment than for the offenses for which he was convicted. It was six times as great as any court in Vermont could have imposed for manslaughter, forgery, or perjury. It was one which, in its severity, considering the offenses for which he was convicted, may be justly termed both cruel and unusual . . . . Fifty-four years confinement at hard labor, away from one's home and relatives, thereby preventing him from giving assistance to them, or receiving comfort from them, is a punishment the severity of which, considering the offenses, it is hard to believe that any man of right feeling and heart can refrain from shuddering.[21]

In discussing whether O'Neil's sentence was too long, Justice Field explored beyond the Wilkerson test of torture, which considered only whether the sentence imposed a cruel method of punishment. He said, "The inhibition of the 14th Amendment is directed, not only against punishments of the character mentioned,[22] but against all punishments which by their excessive length are greatly disproportioned to the offense charged."[23]

Justice Harlan, the great advocate of personal security and freedom, also opted for the protection of the fourteenth amendment:

> The Constitution was ratified because of the belief, and only because of the belief, encouraged by its leading advocates, that, immediately upon the organization of the Government of the Union, articles of amendment would be submitted to the people, recognizing those essential rights of life, and property. . . .Among those rights is immunity from cruel and unusual punishment, secured by the Eighth Amendment against Federal action, and by the Fourteenth Amendment against denial or abridgement by the States.[24]

Thus, the fourteenth amendment's prohibition was reaffirmed by Justice Harlan and a new test for unconstitutional punishment had been suggested. It was evident that the Court would not, due to the controlling decision

in Barron v. Baltimore,[25] construe the "due process" clause to apply the eighth amendment against harsh criminal penalties imposed by the states, but that it would use the fourteenth amendment to set aside any punishment so unfair as to violate "due process." The question was, then, would the Court adopt Justice Field's test of the "proportionality" of the punishment to the offense committed, as a second basis for construing "cruel and unusual."

Howard v. Fleming

The Court did move toward recognition of the test in the case of Howard v. Fleming.[26] In this instance, three men were convicted in North Carolina by a trial court of "conspiracy to defraud."[27] One man was sentenced to seven years and the other two were to be placed in prison for not more than ten years. The sentences were affirmed by the supreme court of North Carolina and they applied to the United States Supreme Court for a writ of error.

Counsel for the plaintiffs in error contended that they were denied equal protection of the laws because two had received longer sentences for the same offense; and that they had been denied due process of law because the sentence was more severe than any ever imposed by that state for the same offense.

A unanimous Court, through Justice Brewer, refused to vacate the judgment of the supreme court of North Carolina, but gave the new test recognition of a negative sort:

> That for most offenses, which may be considered by most, if not all, of a more grievous character, less punishments have been inflicted, does not make this sentence cruel. Undue leniency in one case does not transform a reasonable punishment in another case to a cruel one. Swindling and a con-

> spiracy to defraud does not command itself to sympathy or leniency . . . . If the effect of this sentence was to induce like criminals to avoid its territory, North Carolina is to be congratulated, not condemned. Doubtless there were sufficient reasons for giving one of the conspirators a less term than the others. At any rate, there is no such inequality as will justify us in setting aside the judgment against the two.[28]

Weems v. United States

Evidence that proportionality had become the accepted standard is to be found in the opening statements of the Court's 1910 opinion in Weems v. United States.[29] The Court said: "In interpreting the Eighth Amendment it will be regarded as a precept of justice that punishment for crime should be graduated and proportioned to the offense."[30]

Weems was an employee of the United States Government, working as a paymaster for the Navy in the Philippine Islands. One of the Island statutes[31] made it a crime, punishable with a fine of 4,000 pesos and imprisonment for not under twelve years with cadena temporal,[32] to forge or alter public records. Weems was convicted of making false entries into his records totaling 616 pesos and was sentenced to a minimum of twelve years imprisonment, plus a fine of 4,000 pesos. Attorney for the plaintiff in error claimed that Weems was denied the immunity from cruel and unusual punishment guaranteed by the eighth amendment.

It was decided that the Court would proceed under Rule 35, which stipulated that the Court, at its opinion, could notice a plain error not assigned.[33] The error specifically mentioned by the plaintiff was that a punishment of twelve years imprisonment for altering records was excessively gross and that the wearing of a ball and chain was cruel and unusual per se.

The Court considered the question of what constituted cruel punishment

and invoked the test of torture used in Wilkerson, but then stated that no case had yet called for the exhaustive study of the nature of cruelty, and that a new and systematic study would be undertaken. Justice McKenna, delivering the opinion of the Court, said:

> The word cruelty does not effect, according to modern interpretation, the legislation providing imprisonment for life or years or the death of the offender by hanging or shooting or electrocution. If it did, our laws for the punishment of crime would give no security to the citizen.[34]

The Court gave a new dimension to the test of torture when it said:

> Legislation should not, therefore, be necessarily confined to the form that evil has heretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore, the principle to be vital, must be capable of wider application than the mischief which gives it birth. This is not particularly true of constitutions. They are not ephemeral enactments, designed to meet passing conditions. They are, to use the words of Justice Marshall "designed to approach immortality as nearly as human institutions can approach it." The future is their care, and provisions for events of good and bad tendencies of which no prophecy can be made. In the application of a constitution, therefore, our contemplation cannot be only of what has been, but of what may be.[35]

The Court said here that the evaluation of whether punishment is cruel must ultimately depend on the evolving standards of society.

The judgments of the Philippine courts were reversed. The United States Supreme Court found that Weem's punishment was cruel under the meaning of the Philippine Constitution.[36] The section prohibiting cruel punishment was construed to have the same meaning as the eighth amendment to the Constitution of the United States.[37]

A review of the opinion indicates that the essential fact influencing the decision of the Court was the severity of the punishment. Justice McKenna said:

> Let us confine ourselves to the minimum of the law which is confinement for 12 years and a day, a chain at the ankle and wrist of the offender, no assistance from friends, no rights or property. His prison bars are removed, it is true, after 12 years, but he goes from here to a perpetual limitation of his liberty. He is forever kept under the shadow of his crime, not even being able to change domiciles without notifying the authorities. No circumstance of degradation is omitted. He must bear a chain night and day and is condemned to painful as well as hard labor. These penalties amaze those who have formed their conception of the relation of a State to even its offending citizens from the practice of the American commonwealths, and believe that it is a precept of justice that punishments for crime should be graduated and proportional to the offense.[38]

After Weems, in many subsequent decisions the Court refused to invalidate penal legislation unless the punishment was grossly excessive. The Court still retained its deference to state's rights in the area of criminal law, and was reluctant to use the fourteenth amendment like an axe on state criminal legislation. It must be remembered that Weem's conviction was reversed because of many factors and certainly not the least of these was the use of cadena temporal and the constant harassment by the authorities. To say that the sentence of 12 years was declared excessive and thus cruel and unusual punishment and the only reason for the Court's decision, would be to read something into Weems that the majority never intended.

This attitude of "letting criminal legislation stand" continued in the case of Finley v. California.[39] Finley had attempted to murder his fellow cellmate but had failed in the attempt. Section 246 of the California Penal Code prescribed the death penalty for assaults by a life term prisoner.[40] Plaintiff claimed that he was denied equal protection of the laws under the fourteenth amendment, in that the statute discriminated against inmates serving sentences of life imprisonment by singling them

out for the death penalty.

Justice McKenna delivered memorandum opinion by direction of the Court:

> Plaintiff states that Statute 246 is repugnant to the Fourteenth Amendment of the Constitution of the United States in that it denies him equal protection of the laws because it provides an exceptional punishment for life prisoners. But that Statute makes a reasonable distinction between life prisoners and other convicts . . . and their situations are legally different. The "civic death of the life prisoner is perpetual." The legislature of California did not transcend its power in the enactment of Statute 246.[41]

Collins v. Johnson

The Court became even more protective of state power in this area when it was again asked to limit the police power of California in the case of Collins v. Johnson,[42] which included punishment of 14 years for the crime of perjury. Collins had invoked both the equal protection and the due process clauses of the fourteenth amendment against this sentence. The Court granted his petition for habeas corpus, and Justice Pitney said:

> To establish appropriate penalties for the commission of a crime, and to confer upon judicial tribunals a discretion respecting the punishments to be inflicted in particular cases, within fixed limits by the law-making power, are functions which belong to the several States; and there is nothing to support the contention that the sentence imposed in this case violates the provisions of the Fourteenth Amendment either in depriving appellant of his liberty or in denying him equal protection of the laws . . . . It is hardly necessary to say that the comparative gravity of criminal offenses, and whether their consequences are more or less injurious, are matters for the State to determine.[43]

After the Court expressed such a firm reluctance to interfere with state criminal law in Collins, it was some thirty years before the constitutionality of punishment was again argued before the Court.

Louisiana v. Resweber

Although the Court allowed the states great latitude in defining crime and determining punishment, it was not to be construed as a mandate for absolute freedom in this area. The Court stated many times that grossly excessive fines, disproportionate punishment, or cruel treatment by the states would violate the fourteenth amendment.

In 1947, an unusual case came before the Court on writ of certiorari from the Louisiana Supreme Court, involving one Francis who was sentenced to be executed for murder.[44] He was strapped in the electric chair and the executioner threw the switch. The voltage surged through Francis's body, but then suddenly the current went dead. The switch was thrown again but the result was negative and Francis was returned to his cell. After unsuccessfully seeking writs to prevent a second attempt, Francis eventually brought his case before the Supreme Court.

Francis claimed that another execution would be punishment so cruel as to deny him due process of law. He also claimed that he had been denied equal protection of the laws.

The Court, for opinion purposes, was badly divided, and it is highly probable that heated debate preceded the decision. Justice Reed, speaking for a majority of the Court, said he would proceed with the opinion, "but without so deciding, that violation of the principles of the . . . Eighth Amendment as to . . . cruel and unusual punishment, would also be violative of the Fourteenth Amendment."[45] Continuing, Justice Reed said:

> The traditional humanity of the modern Anglo-American law forbids the infliction of unnecessary pain in the execution of a death sentence . . . . The Fourteenth Amendment would prohibit by its due process clause execution by a State in a cruel manner . . . . The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering in

> any method employed to extinguish life humanely. . . . We cannot agree that the hardship implied by the petitioner rises to that level of hardship denounced as a denial of due process of law.[46]

Specifically, the Court said:

> When an accident, with no suggestion of malevolence, prevents the consummation of a sentence, the State's subsequent course in the administration of its [own] criminal law is not affected on that account by any requirement of due process under the Fourteenth Amendment.[47]

Of importance in this case was the fact that the dissenting opinion of Justice Burton presented the basis for a third test of the constitutionality of punishment. Burton said:

> Taking life by unnecessarily cruel means shocks the most fundamental instincts of civilized man. It should not be possible under the constitutional procedure of a self-governing people. Abhorrence of the cruelty of ancient forms of capital punishment has increased steadily, until, today, some states have abolished its use altogether.[48]

The Resweber case was unique, not just as the only Supreme Court case based on a freakish malfunction of an electric chair, but also because Willie Francis was the youngest person to be executed in Louisiana; at the time of his death he was only sixteen years old.[49] B. Prettyman, Jr. describes the first and unsuccessful execution of Willie Francis:

> Captain Foster, with a quick downward motion, threw the switch. For a fraction of a second nothing happened. Then Willie jumped. He strained against the straps. He groaned. But even those who were witnessing their first execution knew something was wrong. Willie's body, though arched, was obviously not at the point of death. Captain Foster, all in one motion, frantically threw the switch on and off again. Those closest to Willie heard him strain out the words, "Let me breathe." Captain Foster yelled out the window, exhorting Venezia to give him more juice. Only a few seconds had passed, and yet the horrified spectators inside the jail felt as if they had stood transfixed for minutes. As they stared at Willie, they saw his lips puff out and swell like those of a pilot undergoing the stress of supersonic speed. His body tensed and stretched in such catatonic movements that the chair, which had not been anchored to the floor,

suddenly shifted, sliding many inches along the floor.[50]

The Warren Court

To this point the discussion has been confined to judicial action before the mid-fifties, but the period between 1955 and 1968 is worthy of independent attention here for several reasons. Two developments have been noted in preceding chapters: first, the states have demonstrated a willingness to mitigate harsh punishment and even to abolish capital punishment altogether; second, legal action organizations have added serious challenges to capital punishment to the more standard Bill of Rights complaints filed by their attorneys for Supreme Court review. But finally, and perhaps most significant, this period has been marked by a great change in judicial attitude toward criminal law. The Justices no longer viewed state and national criminal legislation sacred. In expanding the concept of due process of law and the scope of the Bill of Rights guarantees, the Court rarely exhibited any reluctance to limit law enforcement officers, prosecutors, judges, or legislatures. Consistent with this new spirit, the Court did not ignore the long-dormant issue of capital punishment. It is not unreasonable, either, to give the Court some credit for establishing the kind of climate which encouraged states to pass abolition legislation and the NAACP and ACLU, among others, to take this issue to court.

Ten years after the decision to uphold the electrocution of Francis, the Court was confronted with a new concept in the realm of punishment. This new concept of cruel and unusual punishment was that of "lost citizenship," which came before the Court in the case of Trop v. Dulles.[51] Briefly, Trop had lost his citizenship because he was convicted of desertion in wartime by a court martial.

Trop claimed that the punishment of expatriation was unconstitutional in that it was contrary to the language of the eighth amendment.

First, the Court examined the punishment of expatriation and in the process made comment concerning the meaning of cruel and unusual punishment:

> We believe, as the court below, that the use of denationalization as a punishment is barred by the Eighth Amendment. There may be involved no physical mistreatment, no primitive torture. There is instead the total destruction of the individual's status in organized society. It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development. His very existence is at the sufferance of the country in which he happens to find himself, the expatriate has lost the right to have rights.[52]

Once again the dynamic view of society was expressed as it was in Weems:

> The exact scope of the constitutional phrase "cruel and unusual" has not been detailed by this Court. But the basic policy reflected in these words is firmly established in the Anglo-American tradition of criminal justice . . . . [That basic policy] is nothing less than the dignity of man. . . . [Moreover] the Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.[53]

The actual legality of the question was considered by Justice Brennan, who, in a concurring opinion, stated that Congress exceeded its power when it passed the expatriation provision.

> I therefore must conclude that Sec. 401(g) is beyond the power of Congress to enact. Admittedly Congress' belief that expatriation of the deserter might further the war effort may find some--though necessarily slender--support in reason. But here, any substantial achievement, by this device, of Congress' legitimate purposes under the war power seems fairly remote. It is at the same time abundantly clear that these ends could more fully be achieved by alternative methods not open to these objections. In the light of these factors, and conceding all that I possibly can in favor of the enactment, I can only conclude that the requisite rational relation between this statute and the war power does not appear--for in this relation the statute is not "really calculated to effect any of the

> objects entrusted to government--and therefore that falls beyond the realm of Congress."[54]

Trop had therefore established a new test of what constituted "cruel and unusual punishment." The Court had reaffirmed the Weems rule of viewing what constituted cruelty in the light of an evolving society but it had also stated that the very basis of the rule should rely upon man and his dignity. The decision falls short in that it sets forth a value without giving a firm way for evaluation. Human dignity is certainly something that should be considered before various types of punishment are imposed but it is naturally difficult to conceptualize the scope and the extent of human dignity when imposing these punishments. The test has not been fully exploited and only future decisions will prove its importance or worth.

Besides the Trop decision, the Court has consented to hear other cases dealing with cruel and unusual punishment. In Robinson v. California,[55] the Court struck down a California statute which made it a misdemeanor for a person to be addicted to drugs.[56] The Court declared that it was proceeding under the assumption that the law violated the eighth amendment and the due process clause of the fourteenth amendment.

Robinson, the addict, protested to the Court that the sentence given to him was a violation of his rights in that it imposed cruel and unusual punishment. Dope addiction, plantiff argued, was an illness and, as such, not punishable as a crime. On review, the Court said:

> The statute makes the status of a narcotic addiction a criminal offense, for which the offender may be punished at any time before he reforms . . . . The Statute is in the same category as one purporting to make it a crime to be mentally ill, or a leper, or to be inflicted with veneral disease.[57]

Actually, it is curious just why the Court reached the fourteenth amendment question at all, when it could have avoided the whole matter by interpreting the statute in a manner that would have saved its constitutionality. The Court could have assumed that the ninety-day sentence was for purposes of rehabilitation. Another strange fact in the case is that Robinson died almost a year before the final decision was rendered, which should have rendered the question moot, but for some reason the Court was not notified of his death.[58] The state formally asked the Court to reconsider its decision but it refused to do so in a summary proceeding.[59]

The Robinson decision seems to have been followed by some state courts, as can be seen in a Colorado decision, which vacated the conviction of a man for public drunkenness who had been convicted of this offense more than 150 times.[60]

In another case, Rudolph v. Alabama,[61] Justice Goldberg was joined by Douglas and Brennan in dissenting from the Court's per curiam refusal to grant certiorari to review a case involving a sentence of death for rape. The petitioner contended that to take the life of the offender, when no life itself has been taken, is inconsistant with the Constitution and the fourteenth amendment, and that death for rape was not one of the legitimate ends of punishment.

Justice Goldberg asked three questions. The first relied upon the existence of a "trend" against the death penalty for rape. He stated that in 65 countries surveyed, all but 5 "no longer" provided for capital punishment in rape cases, and that in the United States, one of the five exceptions, 33 jurisdictions "no longer" permit imposition of the death penalty for rape. The base and the movement are implied in the phrase "no longer". Inspection of the cited data revealed, however, no base and no

movement, only a description of the present legislative situation.[62] The impact here was that if there was no legislative movement away from the death penalty in rape cases, then the technique of due process ajudication could not be brought to bear. It is not a question of the eighth amendment's issue of decency, but rather a question of legislative choice.

In the second and third questions, the focus of Justice Goldberg's concern shifts. The issue to which the second question was directed was the old test of proportionality. Rudolph had contended that it was unproportionately gross to take the life of an offender when no life itself had been taken. Justice Goldberg's opinion of this matter was summed up by a critic when he said:

> The ancient law of lex talonis calls for an eye for an eye, a tooth for a tooth, a life for a life--would not the negative be simple? If no life has been taken, then no life should be forfeited.[63]

The final question deals with the legitimate ends of punishment and Justice Goldberg investigates whether death for rape could be considered as being one of those ends. Here Goldberg's reasoning is unclear but does move in the direction that punishment should fit the crime.

Perhaps what really troubled Justice Goldberg was not the death penalty for rape but the death penalty itself.

Another aspect of the death penalty has recently received attention by the Supreme Court. The Court agreed to hear several cases dealing with capital punishment, and all jurisdictions which have men waiting to be executed are under a stay of execution from the appropriate courts. In one of these cases, Witherspoon v. Illinois,[64] it has been decided that the death penalty cannot be imposed by a jury from which persons with consciencious or religious scrupples against capital punishment are automatically excluded. Justice Stewart said:

> A man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him by the State and can thus obey the oath he takes as a juror. But a jury from which all such men have been excluded cannot perform the task demanded of it . . . . A jury that must choose between life imprisonment and capital punishment can do little more -- and must do nothing less -- than express the conscience of the community on the ultimate question of life or death. Yet, in a nation less than half of whose people believe in the death penalty, a jury composed exclusively of such people cannot speak for the community.[65]

Instead of excusing jurors who hold an opinion against capital punishment, the prosecution must go a step further and ask if the juror's opposition to capital punishment will have any effect on determination of guilt or innocence.[66]

In another case, the Court struck down the federal kidnapping law, or rather the last clause which stated that the death penalty would be administered if the kidnapped person was not released unharmed and if the jury would so recommend.[67] Objections to the law had been raised by attorneys for C. Jackson who was accused of the 1966 kidnapping of a young New Jersey truck driver. The lawyers argued that since the death penalty could only be imposed by a jury, that defendants were made to risk a greater hazard if they chose a jury trial; by pleading guilty or asking for a trial before a judge, they would not face the death penalty.[68] Justice Stewart found the argument persuasive:

> The inevitable effect is, of course, to discourage assertion of the fifth amendment's right not to plead guilty and to deter exercise of the sixth amendment right to demand a jury trial.[69]

The ruling was broad enough to strike down similar jury provisions dealing with the death penalty in federal bank-robbery laws and the Atomic Energy Act's national security section.[70]

CHAPTER IV: FOOTNOTES

1. Wilkerson v. Utah, 99 U.S. 130 (1879).

2. 16 Comp. L. Utah 651 (1868). Cited in Id. at 100.

3. 19 Rev. L. Utah 567 (1878). Cited in 99 U.S. at 101.

4. Attention should be drawn to the fact that the case deals only with an eighth amendment question. Utah, being an incorporated territory, was subject to all laws, treaties, and statutes of the United States. Darr v. United States 195 U.S. 138 (1904).

5. 99 U.S. at 347.

6. Id. at 348.

7. Id.

8. Blackstone, 4 Comm. at 377 (1884).

9. The electric chair was an accidental byproduct of George Westinghouse's development (1885) of alternating current. The Edison Co., which sold direct current, tried to dramatize A.C.'s dangers by using it to kill stray cats and dogs. Impressed, the New York Legislature adopted A.C. for killing humans in a 2,000 volt electric chair at Sing Sing prison.

10. Ex Parte Kemmler, 136 U.S. 438 (1890).

11. Id. at 446.

12. Id. at 445.

13. Id. at 447.

14. Id. at 448.

15. Id. at 446.

16. O'Neil v. Vermont, 144 U.S. 323 (1892).

17. Rev. L. of Ver. of 1800, sec. 3800 & 3802 at 734-35. Cited at Id.

18. Cited in 144 U.S. at 324.

19. Id.

20. Id. at 345.

21. Id. at 355.

22. Justice Field's was referring to passages from Blackstone, 4 Comm. (1884).

23. 144 U.S. at 341.

24. Id. at 356.

25. Barron v. Baltimore, 33 U.S. (7 Pet.) 243 (1833).

26. Howard v. Fleming, 191 U.S. 137 (1903).

27. The men were attempting to weight plain metal bars with lead and then pass them off to the state when they had been properly painted. Cited at 191 U.S. 138.

28. Id. at 143.

29. Weems v. United States, 217 U.S. 349 (1910).

30. Id. at 350.

31. Phil. Pen. Code, Stat. 56, sec. 661 (1896).

32. Cadena temporal involved the wearing of a large ball and chain, the chain being attached to the ankle of wearer.

33. For Rule 35 and all other rules of the United States Supreme Court see Appendix in 210 U.S.

34. 217 U.S. at 369.

35. Id. at 377.

36. Phil. Const. Art. III. Amended by Act of July 1, 1902, c. 1369 Stat. 691.

37. 217 U.S. at 349.

38. Id. at 370.

39. Finley v. California, 222 U.S. 28 (1911).

40. Id. at 31.

41. Id. at 35.

42. Collins v. Johnson, 237 U.S. 502 (1915).

43. Id. at 510.

44. Louisiana v. Resweber, 329 U.S. 459 (1947).

45. Id. at 460. The reader may take note that Francis was a Negro.

46. Id. at 465.

47. Id.

48. Id. at 465.

49. B. Prettyman, Death and the Supreme Court at 107 (1961).

50. Id. at 108.

51. Trop v. Dulles, 356 U.S. 86 (1958).

52. Id. at 89.

53. Id.

54. Id. at 73.

55. Robinson v. California, 342 U.S. 660 (1962).

56. Calif. Health & Saf. Code. sec. 1172 (West 1954).

57. 342 U.S. at 665.

58. J. McDavid, "The Drug Case," 21 Univ. Mo. L. Bull. (Sum, 1963).

59. See A. James, "Cruel Punishments," 48 Minn. L. Rev. at 134 (1963).

60. Driver v. Hinnant, 41 Colo. 2d. 122; 356 P. 2d 761 (1963).

61. Rudolph v. Alabama, 375 U.S. 889 (1963).

62. R. Scotins, "A Life for a Life," 22 Univ. of Mo. L. Bull. at 113 (Fall, 1964).

63. H. Packer, "Comment: Making the Punishment Fit the Crime," 77 Harv. L. Rev. at 1070 (1964).

64. Witherspoon v. Illinois, 20 L. Ed. 2d 776; 88 S. Ct. (1968).

65. Id. at 783.

66. Trial, at 3 (April/May, 1968).

67. Jackson v. United States, 390 U.S. 570 (1968).

68. Id. at 571.

69. Id. at 576.

70. Col Reporter, June 7, 1968, at 8, col. 4.

CHAPTER V

EXECUTIONS

Hanging

From time immemorial, hanging has been considered a more disgraceful death than beheading or shooting. One of the earliest forms of execution, it has survived throughout the ages, gradually becoming more scientific and expeditious, until today it is considered by many authorities as the most meriful form of execution.

The most primitive gallows is provided by nature--the branch of a tree. A formal version of gallows was introduced by the ancient Persians, who installed a small platform in the branches of a tree, from which the executioner pushed the victim to his doom.[1] This first crude example inspired many variations, but in 1288, a German executioner built an upright wooden frame consisting of four pillars which supported a crossbeam positioned directly above a platform. One end securely tied around the throat of the victim, a rope was drawn up and over the crossbeam, and the other end dropped into the hands of the executioner. At a given signal, the executioner would pull back on the rope, lifting the victim from his feet to strangle in mid-air.[2]

Gradually, the more advanced devices for hanging came into use in England, where "the drop," an invention of Berry in 1701, was instituted.[3] The drop is hangman terminology for the distance that the condemned fall,

between the point at which the actual hanging begins and the point at which the total slack is gone from the rope and the body is held in place. The first drop was around ten feet, but the trend was to increase the distance until it became so great as to tear off the head of the offender.[4] The effect of the drop is to snap and dislocate the second vertebra and to rupture the brain stem and the medulla. According to one authority, if the procedure is correct, this dislocation need not occur, because just the pressure created by the impact results in damage too great to prevent immediate unconsciousness, hemorrhage and death. The result, reportedly, is a simple and painless death.[5]

Too often the procedure is deserving of criticism. Physical constitution and attitude toward life are just two of many ways in which each man is different from every other man. It seems reasonable that such differences make what might be a humane death to one man, torture to another.

An example is provided by this account written by Dr. E. Maniss after witnessing a Kentucky execution in 1946, one year before that state adopted electrocution:

> Bill Jackson was led [sic] to the platform and his appearance reminded me of a beaten and broken dog; his face was expressionless; his eyes were distant, and he could not walk under his own power but was supported by four guards. As I took my place on the witness platform the executioner had just placed a black hood over his face . . . . The trap sprang but I did not hear the customary snapping of the neck. The fall had not broken his neck and had failed to render him unconscious. Suddenly Bill's body came to life. His chest expanded until it seemed that it would explode. His legs reached straight up; backwards then forwards. The entire assemblage could hear him gasping and making animal cries. The contortions were increasing in intensity until the executioner, seeing that something had gone wrong, rushed over and seized the legs of the victim and pulled with all his might. It was a full two minutes until the contortions

ceased and elapsed before I was able to pronounce him as dead. I must say that the spectacle left me quite sickened.[6]

Such occurrances are not isolated. There are even more gastly examples:

James Calcraft was a very large and extremely repulsive man. I was told that he was being executed for killing his aunt and her young daughter, then sexually molesting them. The executioner placed the rope and the cape [sic] over his head and the trap was sprung. Calcraft weighed over 300 pounds and the result of the improper execution was made manifest immediately. As he left the trap his body fell forward and his head struck the edge of the steel door with a sickening thud. The blow slowed his speed down considerably and his neck was not broken. Blood flowed from underneath the half-torn hood and the body convulsed until it seemed that the rope must break. Many of us left after this moment and it now seems wise for I am told by a guard that the ordeal became worse.[7]

F. Pernell describes the hideous events that took place on June 18, 1938 in the Iowa prison:

The executioner had just finished securing Wilson's hands and placing the black hood over the head when I took out my pad and pencil so as I could begin my description as I had so often in the past. What happened is hard for me to relate. Something terrible had gone wrong. Either the fall of the body had been too hard or the neck was too soft. The head was completely torn from the body and suddenly the whole room seemed to be covered with blood. The torso was shaking and was still trying to break its restraining bonds. I go tonight to pray God that this inhuman punishment may forever be forbidden in this country.[8]

Sometime the accident will bring the opposite result, as in the case of Will Purvis.

The rope failed to perform the service ordained for it by law. Instead of tightening like a garroter's bony fingers on the neck of the youth, the hangman's knot untwisted and the youth fell to the ground unhurt save for a few abrasions on his skin caused by the slipping of the rope. No tongue can describe and no pen can indite the feeling or horror that seized and held the vast throng. For a moment the watchers remained motionless; then, moved by an impelling wonder, they crowded forward, crushing one another with the force of their movement . . . . Throwing the rope down, the executioner said, "I won't do another damn thing. That boy's been hung once too many times now."[9]

The accounts are endless. One might wonder how many correct executions by hanging have been carried out so that the victim dies a painless death?[10] Even though there are only six jurisdictions in the United States that retain hanging as a form of execution, there have been eleven executions by hanging since 1955.[11] Of these eleven, two admittedly were bungled, and T. Capote, In Cold Blood, makes a persuasive case for the proposition that another two came off "badly."[12]

Because of the fact that so many executions in this century have disintegrated into examples of death by torture is evidence enough to support the argument that hanging cannot be depended on as a humane form of execution. Even the best of hangmen admit that they cannot predict with precision the outcome of any given execution; the possibility of unexpected difficulties seems to increase greatly when the condemned is larger than average in size. Recently, in the state of Washington, John Deamore was hanged for the double murder of a young couple. The executioner misjudged the man's physical stature and Deamore lasted approximately six minutes in slow strangulation. Dr. C. Hearsey gives an account after the body was removed from the scaffold:

> In the anteroom of the prison death row the coffin containing the body of Deamore was brought immediately after the hanging. His neck was so swollen and distorted that I used more than one hundred pounds of ice to reduce the ugly folds of discolored flesh. The rope had mangled Deamore's neck, and had the drop been greater, the man's head might have been torn from his shoulders . . . . This is not the first of these miserable excuses for capital punishment.[13]

A team of medical experts who spent a number of years investigating executions by decapitation and hanging in France, concluded that neither form of death renders the victim totally and painlessly unconscious before death occurs. They were given opportunity to conduct medical research on

a great number of corpses, resulting from executions, during the recent O.A.S. terror rebellion in France and Algeria.[14] A spokesman for the group, Dr. E. Gaertner, has presented clear evidence that even decapitation, previously thought to be the swiftest and most painless of all modes of execution, is a painful and agonizing way to die. Dr. Gaertner describes one of the executions he witnessed:

> Immediately after the head was severed and dropped into the basket, I took charge of it. The facial expression was that of great agony for several minutes after the execution. He would open his mouth, also his eyes, in the process of gaping, as if he wanted to speak to me, and I am positive he could see me for several seconds after the head was severed from the body. There is no doubt that the brain was still alive . . . . His decapitated body, which had previously been fastened by a strap upon a bench, was in continuous spasmodic and clonic convolutions, lasting from five to six minutes, also an indication of great suffering.[15]

Dr. Gaertner also commented on an execution by hanging that he witnessed in 1961.

> The poor fellow was severely jolted by the drop and from the resulting sound I thought surely that his neck was broken and that unconsciousness had resulted. There were the contortions of the limbs and the violent movements of the torso . . . . Dr. Duovior and myself were greatly surprised when our postmortem findings showed that the cause of death had been asphyxiation. The features of the corpse were of a man who had died violently . . . . On the remaining corpses that were brought to us within the span of one month we verified our findings. Four of five necks had been broken, the medulla had been ruptured, and there was severe hemorrhaging in the mid and lower brain area--but the cause of death was not due to these factors. True, these complications will cause death within a few minutes--but they died of . . . strangulation; we even found evidence that one man had died of drowning from the blood that rushed to his lungs when the rope tore neck arteries to pieces.[16]

At this point, it might be well to state the author's reason for the unusually large sample of the eyewitness accounts found throughout this chapter. The intent is not to exploit their entertainment or shock value,

but to present documented testimony for the argument that capital punishment by hanging involves cruelty. Similar quotations dealing with other types of execution will follow; they are meant to serve the same end.

At present there are seven men awaiting execution in those states that administer the death penalty by hanging.[17] If the Supreme Court fails to declare capital punishment unconstitutional then the first of these executions should take place within a few months after the decision.[18] Every possible effort should be made to abolish this death penalty of death by hanging.

Electrocution

Electrocution, as a means of execution, was first adopted by the legislature of the state of New York. The act was signed by Governor David Hill on June 4, 1888, and became effective nine months later. The only previous experience with the device consisted of experiments on animals which have been described as nothing short of butchery.[19]

The first convicted criminal to be electrocuted by electricity was a man named Kemmler. He was condemned to death on June 24, 1889. An appeal was entered on the grounds that the method of execution violated the Federal Constitution's prohibition against "cruel and unusual punishments."[20] His appeal was denied and the execution took place a year later than when it was previously scheduled. The resulting scene was sufficient to produce a segment of opinion that nearly brought about the abolition of capital punishment in New York State.

Kemmler was placed in a wooden chair that rested on a metal platform with the victim himself being the means of ground. He was secured to the chair by straps at his arms and chest, and a metal helmet was placed over

his head. J. Laurence describes the execution:

> Kemmler, a man of about forty, offered no resistance to being strapped in the chair. When the signal was given to E. F. Davis to pull down the switch to allow the current to pass, a terrible pause ensued. To make sure that death would result, a far more powerful current than was recommended was used, and the drying of one of the electrical conductors at the point of contact caused a burning of the flesh. The execution lasted about five minutes. During that time Kemmler fought like a madman and seemed to die in great agony.[21]

From that time until the present the "chair" has claimed some 2,500 victims and some of the accounts that have been written are shocking. Like hanging, electrocution has prompted a large body of literature critical of its use and attentive to every dreadful detail. The experience which prompted these accounts were neither unusual nor confined to the period when electrocution was in its infancy. Many of the most unsatisfactory executions have occured within recent years. A. Squire, chief physican at Sing Sing prison from 1941 to 1957, has included this account in his notes:

> One of the bad executions which I witnessed was in 1955 when Jimmy Gililo was being electrocuted for a gangland murder. Jimmy fought all the way from death row to the ante-chamber and it took six guards to strap him in the chair. As the current was turned on the body seemed to leap forward and the right strap of his arm broke away. The contact must have been greatly reduced because Jimmy twisted and screamed like a wildman. The executioner gave him full power and I saw him literally burn before my eyes. When the body was brought to me for the post-mortem examination I immediately began to run tests on the condition of the corpse. . . . The body temperature was still around one hundred and twenty degrees, and I estimated that it had probably risen to one hundred and fifty. . . . The internal organs were burnt and the flesh near the electrodes was blackened . . . . I can honestly say that this is not the first time such an incident occured.[22]

Dr. Squire says that the terrific current causes instantaneous contraction of the muscles in the body, resulting in severe contortions of

the limbs, toes, face, and protrusion of the eyes. He also reports that rapid burning results at the point of contact, the eyes turn foggy with a star fracture of the lens, and that the heart is dilated and filled with fluid and blood.[23] The exact cause of death, he writes, "is explosion of the upper heart chamber and boiling to death."[24]

A book by H. Patterson and E. Conrad describes an incident which, to borrow a phrase from Justice Frankfurter, shocks the conscience and offends even the most hardened sensibilities.

> One guard came back after they had just burned Will Stokes, an axe-killer. The guard reported that Stokes had died hard and that they had to stick a needle through his head to make sure of it . . . . When I heard this report I was naturally in doubt of the reliability of the source. Many years later I learned from a guard who had been present at many executions that it was a practice to pierce the brain with a sharp object to make sure of those who had "died hard."[25]

The execution of Julius and Ethel Rosenburg at Sing Sing prison in June 1953 illustrates the needless pain and suffering surrounding this form of execution:

> Julius was given the first shock which lasted about three seconds; a second lasting about half a minute; and a third lasting twice as long as the second. The third shock was needless and the result was sickening. The temperature had risen beyond a safe point in the corpse and by the smell I knew that the flesh was starting to burn. . . . The result was a near clearing of the room by most save the warden and a few guards. When they brought the body through the outer-chamber Ethel nearly fainted and it made a deep impression on me that the guards had made no attempt to spare her this trauma . . . Ethel died badly. The executioner must have been a little touchy after the previous experience and he failed to turn the current on quite long enough. When I listened to her heart after the second shock I found that her pulse was strong. She took nearly ten minutes in all to die.[26]

In 1961 it was reported that when John Acres was electrocuted in Arkansas, he broke the straps when the first jolt of current hit him. The guards quickly seized the dazed man and took him to another room while the

chair was repaired. In exactly sixty one minutes John was returned to the chair and electrocuted, over the protests of many observers in the room.[27]

One American scientist is of the opinion, based upon a thorough knowledge of electricity and its physiological effects, that the electric chair is the most inhumane form of execution conceived by man. He says:

> In every case of electrocution, death inevitably supervenes but it may be very long, and above all, excruciatingly painful . . . . I do not believe that anyone killed by electrocution dies instantly, no matter how weak the subject may be. In certain cases death will not come about even though the flesh begins to burn and the point of contact with the electrode for several minutes . . . . This method of execution is torture.[28]

An eminent pathologist has confirmed the same opinion. He points out that very often the real executioner, in those states where electrocution is preferred, is the doctor who does the post-mortem examination. Electrocution is unsportsmanlike, and the smell of frying flesh is sometimes enough to nauseate the members of the press and laymen witnesses.[29]

A strong case can be made for elimination of executions of prisoners by electrocution. The outcome of any given execution is uncertain even in the most skilled hands, and there is no evidence that this mode of execution should not be indicted on the same scientific, humanitarian, and legal grounds applicable to hanging.[30]

Gas Chamber

The gas chamber was first introduced in Nevada in 1924, and at present eleven states now employ this method of execution.[31] The chamber itself is a six-sided steel structure which is hermetically sealed and contains two or three small metal seats. Under each seat is a pool of hydrocloric or sulphuric acid into which the executioner can drop, by mechanical means,

cyanide pellets. At first, the supporters of this mode of execution claimed that it brought immediate and painless death. Today, public and professional outcry in opposition to its use is widespread and some have called it the most cruel method of capital punishment. One reason for these outcries is the fact that, unlike the chair or the rope, the person being executed by gas is not immediately placed in agony or rendered unconscious; but, instead, his execution cannot begin until he takes his first breath, which may be delayed for sixty to sixty five seconds.[32] When it does come the effect is reportedly hideous.

> Hall's head shot up when he inhaled his first dose of gas. Immediately his eyes began to open wide and he started to scream. His movements began to become violentas he tore at the bonds that restrained him . . . I pray God that it may soon be out of the power of men to impose this cruel and inhumane punishment.[33]

The above statement was the reaction of a chaplain who had witnessed his first execution. Others, who are veterans of many executions, express substantially the same views. The executions of Barbara Graham and Caryl Chessman were events that rekindled the old arguments for the abolition of capital punishment. Barbara Graham fainted and required hospital treatment before she could return for the gas.[34] Chessman had been given a last minute stay of execution, which arrived shortly after he entered the chamber, but the warden refused to open the vents and start the powerful fans which could clear away the vapors of the gas. Observers described the agony on Caryl's face when he apparently perceived the cause of the activity outside the chamber:

> Within two minutes he was choking, his eyes were rolling, and his chin jerking up and down, as if trying to cough. There was a great flurry in the chamber as one of the guards had just rushed a message from the Governor. The warden would not give the order and within another two minutes Caryl's head fell forward on his chest as bile and vomit ran from his mouth.[35]

Dr. C. Ziferstein, the physician present at the execution, stated publicly that it would have been possible to save Chessman's life if Warden Dickerson had felt inclined to do so.[36]

Research studies, expert opinions, and the commentary of knowledgeable persons regardingthe gas chamber, have not only failed to produce a case for the gas chamber, but almost always provided fuel for its opposition.[37]

Firing Squad

The firing squad was a popular instrument of execution during the eighteenth century and persists today in military law. Utah is the only state to provide this form of execution, however, state law gives an alternative of hanging. Given such a choice, the overwhelming majority apparently prefer hanging.[38] In Utah, the firing squad is usually composed of ten guards selected from that main state prison. After being taken from his cell, the condemned is either stood against a wall or secured to a post. Each guard is issued a rifle, eight of which contain blanks, while the remaining two are loaded with live ammunition. When the signal is given the entire squad fires, and two bullets will hopefully slam into the heart of the victim. In fact, this type of execution is probably the least painless of all if carried out properly.[39]

No definite pronouncements can be made about execution by shooting in view of its limited use and lack of data and research. The last man executed by a firing squad in Utah was in 1947. For this reason it has been speculated that its use can be discontinued.[40] The United States Army, Navy, and Marines have used the firing squad in the past; the last execution by shooting by the Marines took place in Korea in 1951; by the Army in Germany in 1949; and the Navy has not executed since 1848.[41]

CHART III

METHODS OF EXECUTION BY STATES[43]

Alabama	Electrocution	Montana	Hanging
Alaska	(none)	Nebraska	Electrocution
Arizona	Lethal Gas	Nevada	Lethal Gas
Arkansas	Electrocution	N. Hampshire	Hanging
California	Lethal Gas	New Jersey	Electrocution
Colorado	Lethal Gas	New Mexico	Lethal Gas
Connecticut	Electrocution	New York	Electrocution
Delaware	(none)	North Carolina	Lethal Gas
D. C.	Electrocution	North Dakota	(none)
Florida	Electrocution	Ohio	Electrocution
Georgia	Electrocution	Oklahoma	Lethal Gas
Hawaii	(none)	Oregon	Lethal Gas
Idaho	Hanging	Pennsylvania	Electrocution
Illinois	Electrocution	Rhode Island	(none)
Indiana	Electrocution	South Carolina	Electrocution
Iowa	Hanging	South Dakota	Electrocution
Kansas	Hanging	Tennessee	Electrocution
Kentucky	Electrocution	Texas	Electrocution
Louisiana	Electrocution	Utah	Hanging-Shooting
Maine	(none)	Vermont	Electrocution
Maryland	Lethal Gas	Virginia	Electrocution
Massachusetts	Electrocution	West Virginia	Electrocution
Michigan	(none)	Washington	Hanging
Minnesota	(none)	Wisconsin	(none)
Mississippi	Lethal Gas	Wyoming	Lethal Gas
Missouri	Lethal Gas		

CHAPTER V: FOOTNOTES

1. J. Laurence, Capital Punishment at 41 (1950).

2. C. Duff, A Handbook on Hanging, at 3 (1955).

3. Id. at 16.

4. Id. at 17.

5. A. Mencken, By the Neck at 13 (1942).

6. E. Maniss, Forty Years as Prison Physican at 148 (1950).

7. R. Enoch, "The Ones that Failed," 12 Mass. His. J. at 41 (1939).

8. E. Pernell, History of the Iowa Penal System at 46 (1940).

9. A. Mencken, supra note 5, at 51.

10. For many more accounts see J. Laurence, supra note 1 at 114-167. See also C. Duff, supra note 2, at 114-167.

11. Kansas had 4 executions; Washington 2; Iowa 3; Montana 1; and New Hampshire 1.

12. T. Capote, In Cold Blood at 124 (2d ed. 1968).

13. C. Hearsey, "An Account of Capital Punishment in the State of Washington," A Report: Given Before the Washington H. R. Reprinted in Wash. Med. Mon. No. 31 (Jan. 1961).

14. A. Gaertner, "Capital Punishment in Death," Official Surgeons Journal and Medicial Practices Monthly No. 41 [Great Britain] at 47 (April 19, 1967).

15. Id. at 55.

16. Id. at 58.

17. For details see Wash. Post, June 3, 1968, at 2, col. 4.

18. Kansas will probably execute within one month after the decision. See Id. for details.

19. J. Laurence, supra note 1, at 64.

20. Ex Parte Kemmler, 136 U.S. 438 (1890).

21. J. Laurence, supra note 1, at 49.

22. A. Squire, Sing Sing Doctor at 49 (1958).

23. Id. at 50.

24. Id. at 51. The statement is probably incorrect since protoplasm vaporizes at 194° and also, the heart will filibrate when struck by electric shock but it is highly doubtful whether it would explode or rupture.

25. H. Patterson and E. Conrad, Scottisboro Boy at 81 (1935).

26. R. Sancho, The Offenders at 126 (1960).

27. F. White, "A Terrible Thing has Happened," News Weekly at 44 (June 14, 1961).

28. C. Duff, supra note 2, at 119.

29. Id. at 120.

30. For more case histories and accounts see The Lawson Collection, "Executions," which is a 100 piece series containing much information of this nature. It can be found in the Legal Research Center at the Univ. of Missouri at Columbia.

31. For more information see C. Duff, supra note 2, at 125.

32. Cyanide gas causes paralysis of the nervous system. It is highly toxic, and even when inhaled in the open air and in small quantities its smell is repugnant.

33. H. Henning's account is quoted in R. Carter, Capital Punishment in California at 53 (1963).

34. J. Cotton, Behind the Scenes of Murder at 70 (1961).

35. J. Joyce, Capital Punishment at 17 (1961).

36. Id. at 18.

37. See R. Earl, Man's Judgment on Death at 34 (1964).

38. Although the research is weak in this field, the author can find 17 instances of execution by shooting in Utah within this century.

39. See H. Johnson (ed.), Facts Monthly No. 4 at 12 (1967).

40. For some information in this area see D. Hartung, "Comment," Mo. L. Rev. at 236 (1948).

41. See R. Danzill, Crimes in America at 45 (1954).

42. This effort is presently being made in the case of Bumper v. North Carolina, cert. granted 20 L. Ed. (Doc. 1016, 1968).

43. The information for this chart was taken in the main from J. Joyce, supra note 35, at 101.

CHAPTER VI

CAPITAL PUNISHMENT: A WORLD VIEW

From times ancient until the years immediately preceding World War II, capital punishment was regarded as a largely academic question. In the early 1900's, it appeared as if Beccaria had thoroughly investigated the question in a brilliant treatise of the late eighteenth century.[1] In the period between the two World Wars, however, the emergence of authoritarian systems of penal law once more raised the issue of capital punishment in a particularly acute manner. The end of World War II was followed by a renaissance of those humanitarian tendencies which especially desire to safeguard human rights and human dignity and had always been the mainspring of movements for the abolition of the death penalty.

This renewed interest is reflected in the efforts by many countries during the past two decades to gather information and expert testimony concerning the death penalty.

In the United Kingdom, the Royal Commission on Capital Punishment carried out an exhaustive inquiry which had a considerable impact throughout the world and eventually brought about the abolition of capital punishment in Great Britain in 1964.[2] The great Penal Law Commission on Crime set up by the Federal Republic of Germany in 1961 to reform the penal code, devoted one volume of its report to capital punishment.[3] A number of other countries, such as Canada and the United States have established commissions to study the problem of the death penalty. The findings provided the

subject matter for a remarkable issue of the Annals of the American Academy of Political and Social Science.[4] A criminal review journal of Geneva has similarly devoted a special number to the subject.[5] The majority of criminology journals have taken up the problem and stressed its topical interest. Even in the Soviet Union, the discussion surrounding capital punishment has grown since 1960.[6] These are but a few examples, but they will suffice to demonstrate that the issue is at present commanding the attention and energy of experts and receiving a good deal of world-wide interest.

The most comprehensive report concerning the death penalty was prepared by the Economic and Social Council of the United Nations.[7] United Nations involvement clearly indicates that the death penalty is a matter of great importance to an international community that increasingly stresses the dignity and value of the individual.

The Death Penalty and the Community of Nations

To understand the international status of the death penalty, one must start with a series of what might be termed the geographical map of capital punishment.[8]

The first order of business is a classification of territories and countries according to whether the death penalty is applied or abolished; second, a general knowledge of which countries prescribe which of the most widely recognized capital crimes and their relationship to the rest of the world; last, the geography of recent reform -- where abolition is being accomplished and where it is being rejected.

Death Penalty In Force*

*The list is not complete, some communist countries and obscure territories being excluded.

The countries and territories which have retained the death penalty are: Afghanistan, Australia, Burma, Canada, Cambodia, Central African Republic, Ceylon, Chile, China (Taiwan), Cuba, Czechoslovakia, Dahomey, El Salvador, France, Gambia, Ghana, Gibraltar, Greece, Guatemala, Hong Kong, India, Indonesia, Iran, Iraq, Ireland, Ivory Coast, Japan, Laos, Lebanon, Liberia, Federation of Malaya, Mauritius, Mexico, Netherlands, New Guinea, Nigeria, Northern Rhodesia, Nyasaland, Pakistan, Philippines, Poland, Senegal, Seychelles, Somalia, Spain, Republic of South Africa, Sudan, Surinam, Tanganyika, Thailand, Togo, Turkey, United Arab Republic, Soviet Union, United States in 40 jurisdictions, the Republics of North and South Vietnam.

Death Penalty Abolished

The countries that have abolished the death penalty are divided into three categories:

First group is abolitionist de jure and include: Argentina, Australia in the territories of Queensland, South Wales and Tasmania, Brazil, Columbia, Costa Rica, Denmark, Dominican Republic, Ecuador, Federal Republic of Germany, Finland, Greenland, Iceland, Italy, Mexico in 25 states, Netherlands, Netherlands Antilles, New Zealand, Portugal, Republic of San Marino, Sweden, Switzerland, United States of America in 11 jurisdictions, Uruguay, Venezuela.

Those that have abolished the death penalty de facto include such countries as: Belgium, Liechtenstein, Luxembourg, Vatican City State, Principality of Monaco, Guatemala, Nicaragua, Polonesia.

Those countries that still retain the death penalty but have not executed in at least fifteen years are: Australia, Korea and Nepal.

Execution of the Death Sentence in the World

As previous chapters indicated, the death penalty has been accomplished by a great variety of methods for a great variety of crimes. Today, due partly to the discovery of more humane methods and partly to public pressure, the world carries out the death penalty in ways that are generally accepted as humane and on a vastly reduced number of occasions.

Methods of Execution

Hanging still remains the most frequently used method. It is not only traditional in those countries of the United Kingdom which still retain the death penalty, but, it is generally employed throughout the world. The firing squad is the next most frequent form of execution and often automatically replaces hanging in cases involving the military.[9] Those countries that always employ the firing squad include Chile, Togo, Morocco, Soviet Union and Yugoslavia.[10]

The use of the electric chair and the gas chamber are not at all widely used -- in fact, they appear to be the exclusive property of the Philippines, Nationalist China and twenty-four American states. The gas chamber is used to carry out death sentences in eleven states in the United States. Gas is generally considered barbaric and inhumane in most of the world today and especially in Europe.[11]

Three other methods of execution are employed, but to an even more restricted extent. In Spain the traditional method is strangulation, although the firing squad is gaining more acceptance. Decapitation is employed in two countries: in France, where it is accomplished by guillotine, and in Greece, by broadsword.[12] The last type, and reportedly the most painless and humane, is employed in Norway. A simple systemic poison is either given to the prisoner or it is placed in his food or drink

at a time unknown to him, if he so requests. The drug is colorless, ordorless and tasteless; it causes death within minutes; and the recipient effortlessly loses consciousness within seconds.[13]

Replacing Capital Punishment

Since countries that have abolished the death penalty obviously have no need for any method of execution, they prescribe a wide range of lesser penalties. Invariably, the penalty that is attached to a formerly capital crime consists of the severest type of deprivation of liberty and generally death is replaced by life imprisonment at hard labor. Working on a road-gang in West Germany accompanies life imprisonment, while in Italy, hard labor is prescribed for life term prisoners. Rigorous life imprisonment is the equivalent sentence in Australia, Switzerland, Argentina and Finland.[14]

In some countries, however, life terms are not prescribed. For example, in modern Portugal, where the death penalty was abolished in 1867, the stiffest sentence that can be imposed is not less than twenty and not more than twenty-four years.[15] The law is similar in San Marino, the Dominican Republic, Uruguay, Brazil and Venezuela.[16]

It should be added that, in the countries where the substitute penalty is officially life imprisonment, mitigating circumstances may lead to the reduction of the penalty to deprivation of liberty for a specified term.[17] Furthermore, it is well known that life terms, even when provided by law, are no longer served in practice -- a matter of common knowledge documented by modern penological studies.[18]

Capital Crimes Around the World

Examination of the criminal laws of all those countries which still retain the death penalty, produces a sizable and varied catalogue of capital

offenses. No attempt will be made here to compile an exhaustive table of crimes, country by country. In general, the following list consists of those crimes for which the death penalty is most frequently employed.[19]

1. Murder is by far the commonest capital crime and is punishable by death in 95 per cent of all retention jurisdictions, including such countries as Greece, Burma, Togo*, Sudan, Spain, Hong Kong*, Ceylon, Japan, Liberia*, Ivory Coast and Ireland.

2. Poisoning is punishable by death in Japan, Laos, Morocco, Lebanon*, Turkey, United Arab Republic, Chile and Spain.

3. Killing a woman by abortion is a capital crime punishable by death only in the United States.

4. Rape is an offense deserving of the most drastic penalty in Japan*, the Philippines, Turkey, China, South Africa, Myasaland* and eighteen jurisdictions of the United States.

5. Castration is a capital crime in the Central African Republic, Dahomey, Ivory Coast, Laos, Togo, Morocco and in the state of Georgia.

6. Kidnapping can be punished by execution in France, Ivory Coast, Togo and twenty-five jurisdictions in the United States.

7. Arbitrary detention with torture is a capital offense in Nationalist China, France, Iran and Laos.

8. Train robbery, train wrecking are listed among capital crimes in twenty jurisdictions in the United States.

9. Counterfeiting is punished by death in Poland and the Soviet Union.

10. Treason is punished by death in Australia, Burma*, Ceylon*, Chile*, China*, France, Malaya, Hong Kong*, Liberia*, Pakistan*, New Zealand, twenty-eight jurisdictions of the United States and Zanzibar.

* Indicates that the death penalty is mandatory.

In addition it should be noted that in Afganistan the death penalty is provided for adultery; in Chile, for assaulting a minister of religion; in Dahomey, for transporting a minor person out of the country, the death penalty is usually inflicted. In the United States, Tennessee makes it a capital crime to assault a person with a deadly weapon while in disguise, and in Arkansas, killing by colliding, while in charge of a steamboat, is a crime punishable by death.

Comments and Conclusions

While the preceding index to the world's capital crimes is at least impressive in scope and diversity, much more significant is the actual number of times that the death penalty is imposed and the frequency of such incidents. Some countries where one might expect a high execution rate actually carry out the death penalty very rarely. In El Salvador and Guatemala, the last executions took place in 1956. In the Netherlands Antilles, the last execution was in 1870. Surprisingly, in Laos not one person has been executed since the country gained independence in 1949. In Togo, Gambia, Australia, Western Pacific Islands, Tasmania and Dahomey, over thirty sentences of death were handed down in a twenty-five year period, yet only one has been carried out, while the rest were either quashed or commuted.[20]

In those countries where most death sentences are ordinarily carried out, the facts and statistics are more concrete. Good examples are Sudan, with 547 sentenced and 354 executions; Japan, with 126 sentenced and 118 executions; Hong Kong recorded 30 sentences and 26 executions; New Zealand, where 10 sentences produced 7 executions; and with a near perfect record, Turkey sentenced 33 and executed 32.[21] These figures are for recent times

and extend from a period beginning in 1950 and ending in 1967.

This author, on the basis of a combination of reasonably dependable data, calculated the death penalty toll in terms of several different considerations. First, approximately 42 per cent of those persons sentenced to death in the world were executed during the same seventeen year period that was used above.[22] According to these statistics, the number of people under sentence of death in the world today should be about 2,300, while the number of those actually executed for an average year between 1950 and 1967, is 1,000.[23] Arranging the figures to indicate the incidence of the executions from the years 1935 to 1940 as compared with the world for the same years, the United States executed nearly 700 persons, which converts into approximately 12.2 per cent of the world total. The next two and a half decades would bring dramatic reductions in the number of persons executed in the United States -- only two in the years 1966 and 1967.[24] This figure amounts to less than one-half of one per cent of the world total.

The results of the last inquiry conducted by an official international agency into world statistics concerning capital punishment, was compiled and published in 1962, a survey which was given a good deal of attention earlier in the chapter. While the statistics that this agency compiled in the area of research involving capital punishment are impressive, it loses its authoritativeness if the events of the last six years are ignored. Since that time, Great Britain, Canada, twenty-five of the twenty-nine Mexican States and five of the American States have abolished capital punishment.[25]

Debates about the abolition of capital punishment are currently taking place in the courts and legislatures and offices of the supreme executive

authorities of Poland, Czechoslovakia, Japan, Australia, the United States, Ceylon, France, Ireland, Chile and New Zealand.[26] It may well be that these debates have had some effect in their own right since the world death penalty rate has descreased by a total of ten per cent for the last three years.[27]

Since the first instance of complete abolition of capital punishment under Leopold II of Tuscany in 1786, a total of nearly fifty jurisdictions have followed suit, and in those countries which have not, the number of capital crimes and actual executions of sentences have decreased.[28] According to any criteria, even those countries which have been traditionally harsh on criminals, such as the European communist countries and the Arab States, have undertaken a serious revision of their punitive systems. Whether this trend will continue, is still within the realm of speculation. One fact does seem clear: those countries which have abolished the death penalty have reported no serious internal movement for its reinstatement; and those countries which still retain it; have had mounting pressure for its abolition.

CHAPTER VI: FOOTNOTES

1. See C. Beccaria, Essays on the Punishment of Death (4th ed. 1785).

2. Much of the information for this chapter was taken from the U.N. Survey, "Capital Punishment," 16FCOSOC (1962). On the Royal Commission see Id. at 1-5. It should be pointed out that the original sources from which this international study obtained data about the various countries are cited in the U.N. Survey. Since most of these materials were neither available to this writer nor translated into his mother tongue, there will be no attempt here to cite to them, but rather to the appropriate parts of the Survey.

3. Id. at 6.

4. T. Sellin (ed.), "Murder and the Penalty of Death," Annals of the American Academy of Political and Social Sciences (Nov., 1962). Hereinafter cited as Annals.

5. U.N. Survey, supra note 2, at 5.

6. Id.

7. Id. at 9.

8. The information for the following list is at Id.

9. Id. at 23.

10. Annals, supra note 4, at 144.

11. U.N. Survey, supra note 2, at 22.

12. For the Spanish method of execution see J. Laurence, A History of Capital Punishment at 225-226 (1960); see also G. Scott, The History of Capital Punishment at 25 (1951) for a history of the guillotine.

13. J. Johnson (ed.), "The Medical Aspects of Capital Punishment," Capital Punishment at 114 (1960).

14. Annals, supra note 4, at 47.

15. 24 Y.B. Int'l L. Comm'n 94, U.N. Doc., BOCN 68 (1965).

16. U.N. Survey, supra note 2, at 15.

17. Id. at 32.

18. See Annals, supra note 4, at 78.

19. U.N. Survey, supra note 2, at 42.

20. Id. at 44.

21. Id. at 45.

22. These figures exclude Cuba, Red China, and Viet-Nam.

23. These figures were compiled from U.N. Survey, supra note 2, at 41; Annals, supra note 4, at 49.

24. R. Bacon, "Capital Punishment," 43 Pr. J. (Oct. 1958).

25. U.N. Survey, supra note 2, at 50.

26. Information may be obtained by following the monthly articles of R. Remick, "What About Capital Punishment?" Gospel Mess. Dec. 1967 to May, 1968 and continuing.

27. E. Younger, "The Penalty of Death," 11 Calif. L. Rev. at 113 (1967). Younger's statistics were supplied by the U.S. Dept. of Justice; the F.B.I. Uniform Crime Reports Dept. His figures conflict with those of this author.

28. U.N. Survey, supra note 2, at 28.

CHAPTER VII

SUMMARY AND CONCLUSIONS

Historians are quick to point out that capital punishment has existed since man first began to record the events of civilization and probably many centuries before when the crude communities sprang up. Many sociologists have advanced theories to explain the existence of this universal phenomena. The most widely held of these theories is what this author would call "the value--disvalue theory." Simply stated, this theory holds that any given group will embrace the most important values of communal living in common; values such as sanctity of life, the right to property, and the concept of the "privilege of territory." The value-disvalue theory would then qualify by saying that one or more persons in the group would inevitably violate the commonly held values out of some motivation that is not communal in nature. This violation then, the sociologists would say, brings about the need of punishment which always extends to the life of the offender for the violation of the most important values.

This project has traced capital punishment from its first recorded instance in ancient Persia. The reader may have noted that the death penalty was inflicted in ways which seem barbarous and shocking to the contemporary mind: men were boiled in oil, torn apart by wild horses, and buried alive. There were very few times in the history of this world when nations undertook any type of humane executions, and even these

exceptions are so few as to be nullified when the total impact is understood.

The Dark Ages were, perhaps, the most despicable in terms of executions carried out in the name of justice, and these executions become even more pathetic when one considers that many of them carried out were for religious motives. During these times torture seemed to be a necessary ingredient for every type of punishment. Burning at the stake was a popular form of death among the executioners, and many met their fate in the drowning pits of hidden castles.

During the Medieval periods the death penalty did not decease in intensity and did not vary extensively in the manner of infliction from the Dark Ages. The Industrial Revolution, which followed the Medieval period within two centuries, brought great numbers of people together in small areas and crime began to rise. As a result of this rise in crime, many countries enacted hundreds of capital statutes and most were for things that would not even constitute misdemeanors in our twentieth century. Our Mother country, England, executed thousands of persons a year for nothing more than stealing bread or taking fish from the market. Not many reforms found their way into the law during this period and the "Black Codes" continued to take their toll.

When our forefathers migrated from England, a new type of penal code was devised to fit the needs of a strange and virgin land. These colonial codes were generally theocratic in nature, since they dealt mainly with the crimes mentioned in the Old Testament. When examining the criminal law of the various colonies, one can find a great variation in capital statutes but can also find an average of five or six capital offenses per individual colony; a pronounced reduction from the many

hundreds in force at that time in England. Corporal punishment was substituted in the place of many crimes previously considered to be capital, and it was not unusual in those days to witness daily duckings in the community pond nor to see men walking around with great pots tied about their necks filled with rotting ale because they had been drunk the night before.

As time passed in the New World, there was a movement back to the old standards and many of the colonies passed a great number of capital statutes. When the Constitution was ratified, there was a marked concern for penal practices, and there was included in the Bill of Rights a provision forbidding the infliction of cruel and unusual punishment. The framers of the Constitution had in mind, when they passed this provision, the practices that occurred in England during that century and even some of the events such as branding, drowning, and whipping, which were taking place in the new states.

The provision against cruel and unusual punishment in the eighth amendment to the Constitution of the United States went largely overlooked until the beginning of the twentieth century. The main reason for this was a Supreme Court decision which ruled, that as a federal question, the Bill of Rights was not applicable to the states, only to the national government. The result, in terms of the eighth amendment, was to leave the states free to establish their own penal codes and conduct their punitive systems in the way in which they saw fit.

With the end of the Civil War, Congress attempted to correct this problem of the non-applicability of the Bill of Rights when they passed the fourteenth amendment. Although this amendment was intended mainly for the benefit of the newly freed Negro, there were provisions that

provided due process of law, equal protection of the laws, and privileges and immunities of citizenship. The impact of the amendment was largely nullified, however, because of the fact that the Supreme Court refused to apply the fourteenth amendment, except in extreme circumstances, with any force to the states.

Gradually, one of the provisions of the fourteenth amendment, that of due process, began to take on new dimensions with the Court and a concept which would make the states responsible to their citizens and to the federal courts was developed. The Supreme Court formulized tests of due process and began to supply concreteness to an idea of fairness and procedure. The states were limited in some areas when it was ruled that they must provide the fundamental justice to persons under their protection, and, for the most part, those concepts and rights were defined by the federal courts.

It was also ruled that states could violate a persons due process in actions as well as in principle. The states were required to supply a measure of fairness and not to proceed in ways that were considered unreasonable and capricious to prudent men. This area of due process was extended to the concept of cruel and unusual punishment until it was considered that some punishments such as torture, denaturalization, and very extreme treatments violated the guarantee against cruel punishment per se. The problem of due process was a complex situation and many theories and ideas were held by the members of the Supreme Court who had the greatest burden of definition and determination. Some thought that the Bill of Rights was incorporated totally within the commands of the fourteenth amendment, while others thought that the only way to determine due process was by a case by case approach, examining each instance for

fairness and reasonableness.

Capital punishment was attacked many times in the history of this nation but as of yet no court has held the death penalty to be unconstitutional. One of the most obvious and direct methods to initiate an attack on the legality of capital punishment would seem to be in the area of cruel punishment, which the scope of the guarantee in the eighth amendment forbids. If capital punishment is found to violate this limitation of punishment which is imposed by the eighth amendment, then the states themselves would be directly affected and limited _via_ the due process clause of the fourteenth amendment. Many attacks have been made using this theory and method to invalidate punishments of all sorts. The courts generally consider that punishment for crime should be graduated and proportioned to the offense and that penal practices should not remain static but develop with the evolving concepts of decency in our society. In other words, what was considered standard punishment a century ago, is not necessarily considered to be fair and just today.

The courts have also begun to consider questions which relate to capital punishment that deal with acute problems of our society. Some of these questions such as race, religious and moral convictions, and traditional legal safeguards have been the subjects of the Supreme Court's most recent decisions. The Court has ruled, for instance, that the sixth amendment "impartial jury" is violated when persons with religious or moral convictions opposed to capital punishment are automatically excluded from juries. This decision, and others, directly affect the status of capital punishment when jury trials are provided.

For the purpose of this project only one legal objection to the death penalty was researched in depth: the _cruelty_ of executions. Many

accounts of executions that were "bungled" provided the framework for this thesis on cruelty. All four types of executions commonly employed in the United States, electrocution, hanging, gassing, and shooting, were studied.

Medical data, whenever possible, were employed, and the bulk of these data came from doctors attending executions or performing post-mortems on bodies of executed prisoners. On the basis of the medical reports and the eye-witness accounts of the executions, it was the conclusion of the author that the accepted forms used in carrying out the death penalty in the United States were cruel per se. If this judgment is acceptable, then it is only logical that the death penalty, as it stands, should be declared unconstitutional. Other methods of execution were noted as possible alternatives to the present methods, such as use of a painless and odorless gas or donation of the body to medical research. Of course, these methods themselves suggest new constitutional questions and, as a result, their use was not suggested but merely noted.

To widen the scope and to complement a greater understanding of capital punishment, a section was provided in the project which dealt with an international list of capital crimes, death penalties, and other information. Many facts were noted, such as, hanging is the most commonly used form of execution in the world, with shooting as second; electrocution and gassing are rare forms, with only three countries using either; and beheading is still used in two countries. In terms of statistics, it was found that the execution rate for one year is approximately 1,000 persons, with the number steadily decreasing each year -- the number decreased to 900 in 1967. It was also noted at this point that the rate of capital

punishment in the United States accounted for a large percentage of the world total in 1930, but that this figure has descreased to less than one percent in 1968. In fact, only two executions have taken place in the United States since 1966, which would account for this low percentage in the world total. Current reports will show that many of the countries that now retain the death penalty are debating for its abolition at this time. In the United States we find no less than eighteen states which have the question of capital punishment either before their respective state legislatures or their appellate courts.

In a final summary, a few conclusions can be drawn from the data presented in this project. First, capital punishment is now a substantial questions and will be brought before the courts for a final decision to determine whether it will remain or be prohibited and simply serve to remind us of a more retributive past. Second, there is at present a vast movement in the United States and in the rest of the world to abolish the death penalty through the elected representatives of the people, and this end has been accomplished in a good number of countries. Third, in those countries where the death penalty is imposed, the research has substantiated the claim that execution, by the accepted methods in the world today, is torture and that in the United States torture is contrary to the Constitution.

Although the words of the eighth amendment are not precise and have not yet been fully interpreted by the Supreme Court, there are certain tests and pronouncements the Court has made. The Court has repeatedly stated that punishment that falls into the category of torture or unnecessary cruelty, would violate the eighth amendment. These punishments of torture are not always precise and they may change with the evolving

decency of our society. What was not considered torture a century ago may well be considered to be so in our present year.

The Court has also used the test of the proportionality of punishment. They have held for many years that punishment for crime should be proportionate to the offense committed. The Court, however, has allowed great latitude to the States in their interpretation of punishment for crime.

Another series of tests, which deal with reasonableness, have been formulated. The Court can test punishment to see if it shocks even the most hardened sensibilities and recently they have ruled out punishments which violate the dignity of man.

Capital punishment has existed in the community of men now for many hundreds of centuries. It has followed him from country to country, from continent to continent. It has written a dark chapter in the book of history; and it is generally considered as the most outstanding of man's inhumanity to man.

LIST OF CASES

FEDERAL

Barron v. Baltimore, 33 U.S. (7 Pet.) 243 (1833).

Bumper v. North Carolina, (Doc. 1016) (1968).

Collins v. Johnson, 237 U.S. 502 (1915).

Darr v. United States, 195 U.S. 138 (1904).

Finley v. California, 222 U.S. 28 (1911).

Howard v. Fleming, 191 U.S. 137 (1903).

Kemmler, Ex parte, 136 U.S. 438 (1890).

Louisiana v. Resweber, 329 U.S. 459 (1947).

O'Neil v. Vermont, 144 U.S. 323 (1892).

Palko v. Connecticut, 302 U.S. 325 (1937).

Pennsylvania v. Ashe, 302 U.S. 461 (1947).

Robinson v. California, 372 U.S. 660 (1962).

Rochin v. California, 342 U.S. 168 (1952).

Rudolph v. Alabama, 375 U.S. 889 (1963).

Trop v. Dulles, 356 U.S. 86 (1958).

United States v. Jackson, 390 U.S. 570 (1968).

Weems v. United States, 127 U.S. 349 (1910).

Wilkerson v. Utah, 99 U.S. 130 (1879).

Witherspoon v. Illinois, (Doc. 1015) (1968).

STATE

Driver v. Hinnant, 41 Colo. 3d 122; 356 P. 2d 761 (1963).

State v. Frank O'Brien, 106 Vt. 97; 170 A. 198 (1934).

BIBLIOGRAPHY

GOVERNMENT PUBLICATIONS AND DOCUMENTS

Annals of Congress, XXXVIII (1787).

Federal Bureau of Prisons, "Executions," LVI (1967).

California Health and Safety Codes (West 1954).

Nevada Constitution, Article I - 16.

United States Constitution, Amendment V.

United States Constitution, Amendment VI.

United States Constitution, Amendment VIII.

United States Constitution, Amendment XIV.

Utah Revised Laws XIX, (1878).

Utah Composite Laws, XVI (1868).

AD HOC MATERIAL

New York Temporary Commission on Revision of the Penal Law and Criminal Code, 4th Report "Capital Punishment," Report on the Penal Practices of New York. (1968).

United Nations Survey, "Capital Punishment," 16 Economic and Social Affairs Committee (1962).

Yearbook of the International Law Commission, United Nations Document BOCN 68 (1965).

BOOKS

Abraham, Henry. The Judiciary.

Allen, Francis. The Borderland of Criminal Justice. Chicago: University of Chicago Press (1964).

Andrews, William. Bygone Punishments. New York: New York Press, (1898).

Attenborough, Franklin. The Laws of the Earliest Kings. New York: Russell & Russell (1963).

Barnes, Frank. (ed.) The Complete Works of Edward Livingston. New York: Vail-Ballou Press (1873).

Barnes, Harry and Negely Teeters. New Horizons in Criminology. New Jersey: Prentice-Hall, Inc. (1959).

Beccaria, Ceasare. Essays on the Punishment of Death. New York: Vail-Ballou Press (4th ed. 1785).

Bedau, Huego. (ed.) The Death Penalty in America. Chicago: University of Chicago Press (1964).

Billias, George. (ed.) Law and Authority in Colonial America. Massachusetts: Barre Publishers (1965).

Blackstone. 2 Commentaries. London: London Printing House (1750).

Blackstone. Great Charter. London: London Printing House (1748).

Bryce. 1 American Constitution. Washington: United States Government Printing House (1889).

Bye, James. Capital Punishment in the United States. Washington: Gress Printing House (1919).

Caldwell, Frank. Red Hannah. North Carolina: Rishmen and Company, (1947).

Camus, Albert. "Reflections on the Guillotine," E. London (ed.), New Jersey: Prentice-Hall, Inc. (1960).

Carlston, Kenneth. Law and Structures of Social Action. New Jersey: Rhinehart and Company, Inc. (1956).

Carter, Renoid. Capital Punishment in California. California: San Francisco Printing House (1963).

Chitwood, Oliver. History of Colonial America. New York: Harper & Brothers (1931).

Choust, Hermann. The Rise of the Legal Profession In America. Vol. II Oklahoma: University of Oklahoma Press (1965).

Copote, Truman. In Cold Blood. New York: E. P. Dutton & Company (1960).

Cotton, John. Behind the Scenes of Murder. New Jersey: Harper & Row (1961).

Cowers, Charles. A Life For a Life. Massachusetts: Boston Publishing Company. (1966).

Dalzell, George. Benefit of Clergy in America. Illinois: University of Illinois Press (1955).

Danzill, Robert. Crimes In America. New Jersey: Harper & Row (1934).

Dimont, Max. Jews, God and History. New York: American Library Press (1962).

Disalle, Michale. The Power of Life or Death. New York: Random House Publishing Company (1965).

Duff, Charles. Handbook on Hanging. London: Putnam Company LTD. (5th ed. 1952).

Earl, Robert. Man's Judgment on Death. New York: Collier Printing Co. (1964).

Ehrmann, Herbert. Capital Punishment Today. California: San Francisco Printing House Inc. (1957).

Evans, E. Criminal Prosecution. Chicago: University of Chicago Legal Press (1961).

Fellman, David. Defendant's Rights. New York: Rhinehart & Company, Inc. (1958).

Filler, Albert. Movements to Abolish the Death Penalty in America. New Jersey: Berne Printing House Inc. (1954).

Gould, Samuel. Curiosities of Olden Times. Iowa: University of Iowa Press (1951).

Heline, Timothy. Capital Punishment. New York: New Age Printing (1965).

Honnold, John. Life of the Law. New Jersey: Princeton University Press (1964).

Johnson, John. The Medical Aspects of Capital Punishments. Pennsylvania: Ray & McKenna Press (1960).

Joyce, James. Capital Punishment. New York: Prentice Hall Inc. (1947).

Kelly, Alfred and Winfred Harbison. The American Constitution: Its Origin and Development. New Yor: W. W. Norton Inc. (3rd. ed. 1963).

Laurence, John. A History of Capital Punishment. London: G. T. Putnam & Sons (1960).

Maine, Sir Henry. Ancient Law. London: J. N. Dent & Sons LTD. (1960).

Mangesi, Tui. A Study of the Law of China. Boston: Ocean Printing Co. (1908).

Maniss, Edward. Forty Years As Prison Doctor. Mississippi: Jackson Press Inc. (1950).

Marke, Julius. Vignettes of Legal History. New Jersey: Fred B. Rothman & Company (1965).

McClellan, Grant. Capital Punishment. New Jersey: Wilson Publishing Company (1964).

McKechnie, William. Magna Carta. London: Putnam & Sons (1914).

Mencken, August. By the Neck. New York: Harper & Row (1914).

Merness, Nanthan. Maryland as a Proprietary Province. Maryland: Baltimore Press (1901).

Patterson, Herbert and Earl Conrad. Scottesboro Boy. New York: Charles Scribner's Sons (1935).

Pernell, Elbert. History of the Iowa Penal System. California: Los Angeles Press Ltd. (1940).

Plaidy, Jean. Rise of the Spanish Inquisition. London: G. T. Putnam & Sons (1959).

Pound, Roscoe. Development of Constitutional Guarantees of Liberty. London: London Publishing House (1957).

Pound, Roscoe. Social Control Through Law. New Haven: Yale University Press (1942).

Prettyman, Bernard. Death and the Supreme Court. New York: Verne Press LTD. (1961).

Radzindwicz, Leon. History of the English Criminal Law. Vol. I London: G. T. Putnam & Sons (1948).

Riensch, P. S. Common Law Heritage. New York: John Hopkins University Press (1959).

Root, Jonathan. The Betrayers. New York: Coward-McCann, Inc. (1963).

Runes, Dagobert. The Disinherited and the Law. New York: Philosophical Library Inc. (1964).

Sancho, Robert. The Offenders. New Jersey: Prentice Hall Inc. (1960).

Savitz, Leonard. Dilemmas in Criminology. New York: McGraw Hill Book Company (1967).

Schubert, Glendon (ed.). Judicial Decision Making. London: Collier-MacMillan, LTD. (1963).

Scott, George. The History of Capital Punishment. Indiana: Notre Dame Press (1951).

Sellin, Thorsten. Capital Punishment. New Jersey: New University Library Press (1966).

Sellin, Thorsten. The Modern Penal Code. New Jersey: New University Library Press (1965).

Spear, Charles. Essays on the Punishment of Death. New York: Baine & Howard Publishing Company (1884).

Squire, Albert. Sing Sing Doctor. New York: Frank Publishing Co. (1958).

Stanford, Mary. Colonial Virginia. New York: Citadel Press (1934).

Stanton, Henry. Reforms and Reformers. New York: John Riley & Company (1948).

Story. 2 Commentaries. Washington: United States Government Printing House (1896).

Stuchiner, Theresa. Crimes and Penalties. New York: Oceana Publications (1953).

Vernadsky, George. Medieval Laws. New York: Octagon Press (1965).

Wilson, Margret. The Crime of Punishment. New York: Harcourt (1936).

Zane, John. The Story of the Law. New York: Ives Washburn Publishers (1928).

SCHOLARLY PERIODICALS

Armstrong, William. "The Foundations of Criminal Justice," American Bar Association Journal. LIV (March, 1968).

Burbey, Herbert. "The History of Executions in What is Now the State of Michigan," Michigan Historical Magazine. XII (1933).

Collins, David. "They Did Not Fail Again," Louisiana Law Review. XXIV (September 18, 1949).

Davis, John. "The Organized Bar and Racial Relations," American Bar Association Journal. LIV (June, 1968).

DeVot, Reynold. "Does Maryland Abolish Capital Punishment?" Missouri Law Review. LIII (March, 1968).

Enrich, George. "Capital Punishment," Vanderbilt Law Review. XXXVI (May, 1968).

Enoch, Ralph. "The Ones that Failed," Massachusetts Historical Journal. XII (1939).

Fellman, David. "Cruel and Unusual Punishment," Tennessee Law Review. XXXVIII (February 10, 1968).

Fruend, George. "A Bill to Abolish Capital Punishment," Tennessee Law Review. XXXVIII (February 10, 1968).

Gaertner, Albert. "The Condition of Capital Punishment in Death," Surgical Journal and Medical Practices Monthly. LXVII (April 19, 1967).

Gottlieb, Gerald. "Capital Punishment," Case and Comment. LXXII (July-August, 1967).

Gottlieb, Gerald. "Testing the Death Penalty," Southern California Law Review. XXXIV (Fall, 1961).

Hartung, Daniel. "Comment," Missouri Law Review. XXXIII (June, 1943).

Haskins, John. "The Capitall Lawes of New England," Harvard Law Review. LXVIII (March, 1956).

Hearsey, Charles. "An Account of Capital Punishment in the State of Washington," Washington Monthly Medical Bulletin. XXXI (January, 1961).

James, Andrew. "Cruel Punishment," Minnesota Law Review. LI (1963).

Jartas, Frank. "The Constitutional Prohibition Against Cruel and Unusual Punishment," Vanderbilt Law Review. XVIII (April, 1951).

McDavid, James. "The Drug Case," University of Missouri Law Bulletin. XXI (Summer, 1963).

McWilliams, Frank. "Use and Misuse of the Eighth Amendment," American Bar Association Journal. LIII (April, 1967).

Neal, Franklin. "Capital Punishment," Texas Law Review. L (July 16, 1966).

Packer, Herbert. "Making the Punishment Fit the Crime," Harvard Law Review. LXXVII (March-June, 1965).

Paine, Donald. "Capital Punishment," Tennessee Law Review. LIV (Summer, 1967).

Post, John. "Early Efforts to Abolish Capital Punishment," Pennsylvania Law Review. XI (1949).

Scotins, Robert. "A Life for a Life," University of Missouri Law Bulletin. (Fall, 1964).

Sellin, Thorsten. (ed.) "Murder and the Penalty of Death," Annals of the American Academy of Political and Social Science. (November, 1962).

Stoneburg, Grant. "Great Britain Abolishes Capital Punishment," Canadian Law Review. LVI (November, 1967).

Younger, Everet. "The Penalty of Death," California Law Review. XXXVIII (December, 1967).

Wilson, Rocco, "Capital Punishment in the United States," Law Reporter. Number 487 (May 16, 1846).

NEWSPAPERS AND MAGAZINES

Columbia Reporter, June 7, 1968.

The Indianapolis Reporter, January 8, 1968.

The Kansas City Star, May 31, 1968.

The Kansas City Star, June 11, 1968.

Montesquieu. "Executions," Paris Magazine XVIII (1774).

The New York Tribune, December 29, 1968.

Playboy Magazine, "Playboy Florum," (May, 1968).

Remick, Richard. "What About Capital Punishment," Gospel Messanger. (May, 1968).

Saint Louis Globe Democrat, April 14, 1968.

Time. "The Law," XXXIX (April 19, 1967).

Time. "The Law," XXXVII (April 2, 1965).

Topeka Eagle, April 13, 1968.

U.S. News and World Report, "March of the News," XX (April 5, 1968).

Washington Sentinel, June 3, 1968.

White, Errol. "A Terrible Thing Has Happened," New Weekly. XXIII (June 4, 1961).

CAPITAL PUNISHMENT

by

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AN ABSTRACT OF A MASTER'S THESIS

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THESIS ABSTRACT

The subject of capital punishment is receiving noticeably increased attention from many quarters. Indeed, while some cry out for the return to an era when prison sentences were more severe and the death penalty was inflicted hundreds of times every year, others counter with equally demanding proposals for the elimination of much of the deprivation characterizing a criminal conviction. The basic conflict can be recognized as a constant in the history of organized society: security and order *versus* freedom and individual liberty, each set of values held dominant by one of two opposing groups. Today, however, the confrontation seems unusually more practical than philosophical, surrounded as it has been with an acute and emotional national concern over the incidence of crime as reflected in legislative action, political campaigns, the mass media, interest group activity, and general grass roots alarm, and productive of controversy at almost every encounter.

That any legal system governed by the rule of law must place the maintenance of order among its primary goals cannot be disputed as a general statement, and further, it is agreed that order cannot prevail without control of crime. However, this thesis presents no challenge to the *purpose* of the law; the question here concerns the *method*: Can capital punishment be permitted or justified as a means to accomplish a legitimate purpose of law?

It is at least a two-fold question: moral and legal. It is moral in that the decision ultimately is one of conscience--whether it is *wrong* to take a human life as punishment for the commission of a crime. The

question is legal in that capital punishment presents a threat to the dignity of man, the concept of essential fairness and the humanitarian traditions which are the heart of our legal system and fundamental to our democratic society.

The author's position on the subject is that capital punishment should be abolished completely and replaced by stringent containment. Although this position results from a multi partite attack on capital punishment, only one facet of the catalogue of objections can be evaluated thoroughly here: the cruel and torturous nature of the method of administering the death penalty today under the accepted forms of executions employed by the various jurisdictions in the United States. Capital punishment is torture; torture is an unconstitutional act, forbidden by the eighth amendment and the due process clause of the fourteenth amendment to the Constitution. The purpose of this thesis is to launch a substantial attack on the death penalty using the legal grounds of "cruel and unusual punishment."

A word of explanation is in order for the inclusion of a wide range of source material in a primarily legal study. This author feels that a comprehensive understanding of capital punishment must be based on knowledge drawn from the entire spectrum of the social sciences. Therefore, the reader will find a large amount of historical, sociological and psychological data intertwined with the legal research. An attempt even has been made to include a limited amount of scientific and medical data to supplement the discussion on executions. In some instances, quanitative analysis has been utilized to illustrate the trends of the imposition of capital punishment and other correlatives which are of importance to

understanding the law of the severest of all penalties.

Still another reason for the wide diversification of data is the fact that no simple comprehensive work on capital punishment is available today. Many studies have been commissioned by the resultant reports are limited to specific geographical areas or simple classifications of crimes and penalties. Learned scholars tend to investigate the subject within the scope of their discipline, and legal writers limit themselves in terms of jurisprudence and case analysis. This author found that a comprehensive compilation and systematic analysis of these findings were essential if justice were to be done to the question of capital punishment.